

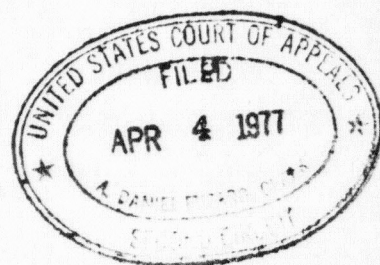
***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

To be argued by
ELIZABETH B. DuBois

76-7295



United States Court of Appeals
FOR THE SECOND CIRCUIT

CARL A. BEAZER, *et al.*,

Plaintiffs-Appellees,

—against—

NEW YORK CITY TRANSIT AUTHORITY, *et al.*,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF PLAINTIFFS-APPELLEES

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
NO. 76-7295

CARL A. BEAZER, et al.,

Plaintiffs-Appellees,

-against-

NEW YORK CITY TRANSIT AUTHORITY, et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF OF PLAINTIFFS-APPELLEES

This is an appeal by the New York City Transit Authority (hereinafter "TA") from an order of the district court entered January 28, 1977 incorporating and amending its previous order entered May 20, 1976.

Plaintiffs have cross appealed from that portion of the court's order denying relief to certain individual plaintiffs.

TRANSIT AUTHORITY APPEAL

ISSUES FOR REVIEW

(1) Whether the court below erred in holding that the policy of excluding from employment in any of its non safety sensitive positions all present or past methadone maintenance participants violated the due process and equal protection clauses of the fourteenth amendment, where the court found that the policy bore no rational relationship to legitimate TA needs in that the evidence demonstrated that:

(a) methadone treatment can permit former drug abusers to function entirely normally;

(b) substantial numbers of those in methadone maintenance treatment are as fit for employment as other persons;

(c) the TA was capable of identifying which methadone maintenance participants were suitable for employment by its regular personnel procedures;

(d) the TA had no similar bar against the employment of persons with alcoholism and other drinking problems, epilepsy, diabetes, heart disease, or persons taking amphetamines or other drugs but, rather, considered such persons for employment on an individualized basis.

(2) Whether the court below erred in holding that the TA's policy violated Title VII of the 1964 Civil Rights Act in that it had a substantially greater impact on minority groups than on whites and was not rationally related to any employment needs of the TA.

(3) Whether the court below erred in holding that plaintiffs were entitled to an award of costs and attorneys' fees under the 1976 Civil Rights Attorneys' Fees Award Act as well as under Title VII of the 1964 Civil Rights Act, and whether the court abused its discretion in setting the amount of that award.

INTRODUCTION

At issue on this appeal is the legality of the TA's policy of denying employment to any person who has ever participated in a methadone maintenance treatment program. The policy is an absolute, across-the-board prohibition which applies to every one of the TA's 47,000 job positions; it requires that any job applicant or current employee who is found to have a history of methadone maintenance treatment be automatically rejected or fired with no consideration of individual qualifications, demonstrated work performance or years of service at the TA or elsewhere.

Specifically not at issue here is the TA's right to exclude methadone maintenance participants from safety sensitive jobs. Under the court's judgment the TA is

expressly authorized to continue its methadone policy with regard to jobs such as motorman, conductor, bus operator, towerman and positions dealing with high voltage. App. 339a; 399 F.Supp. 1058, App. 391a. It is only with respect to non-sensitive positions requiring no greater skill or responsibility than would typically be required in the common occupations of our society that the judgment below requires the TA to give individualized consideration.

Also not at issue is the TA's right when assessing methadone maintenance participants to take into account any job related factors, including their particular drug histories and records in treatment. App. 448a; 390 F.Supp. at 1058, App. 391a.

The significance of the rights here at issue is obvious. Methadone maintenance is and has been for the past decade the predominant form of treatment for heroin addiction,^{1/} and it is ordinarily not a short-term but a long-term and sometimes lifetime treatment modality.^{2/} Discrimination against methadone participants therefore affects the great majority of all rehabilitated addicts and may constitute a permanent exclusion from employment opportunity.

There is no controversy as to the employability of methadone maintenance participants. The evidence is clear that they are in no way limited in their job performance abilities. Obviously some methadone participants do not succeed in treatment. But the evidence below demonstrated that an employer can determine relatively easily which methadone participants are successful and which are not. Indeed, an employer can know far more about its methadone maintained employees than it can know about any other employees.

^{1/} Of the national census of 130,000 persons receiving treatment for prior opiate abuse, approximately 60 percent are in methadone treatment. Strategy Council on Drug Abuse, Federal Strategy for Drug Abuse and Drug Traffic Prevention 22 (1974); see also pp. 20-21 *infra*. The total annual public cost of methadone maintenance treatment facilities in the New York City area alone is roughly \$56 million. Community Service Society of New York, Methadone Maintenance Treatment in New York City 2 (1975).

^{2/} App. 1561a; Dealing With Drug Abuse, A Report to the Ford Foundation 220-21 (1972).

The evidence on these key facts was virtually uncontroverted below despite the fact that at the court's insistence evidence was heard from persons representing a wide range of viewpoints on methadone to ensure that it had a full and true picture.

The TA rests here as below largely on its argument that methadone is "controversial." The essential point — never grasped by the TA — is that the controversy associated with methadone has nothing whatever to do with the issues in this case. The controversy is about issues relating to whether methadone is the best method of treating heroin addicts, how many governmental resources should be devoted to it, whether the regulations governing its use are appropriate, and so forth. All these red herrings were explored and dispensed with by the district court.

The irrationality of the TA's methadone policy is further demonstrated by the TA's isolation on this issue. The TA was unable to get a single expert with any knowledge of methadone treatment to defend the policy's rationality. The TA's position was not supported by its co-defendant, the New York City Civil Service Commission.^{3/} Indeed, the TA's policy violated the Commission's medical standards governing the appointment of methadone maintenance participants to clerical and other "city-wide" positions within the TA. More significantly the city, state and federal governments all have promulgated laws and regulations governing civil service employment which bar discrimination against methadone maintenance participants. The language contained in all these provisions makes clear that they were passed in recognition of the fact that such persons are entirely capable of normal job performance.^{4/}

^{3/} The Civil Service Commission was originally named as a defendant, but it took no active role in the trial and the action was subsequently dismissed as to it. App. 451a.

^{4/} See 399 F.Supp. 1051-52, App. 384-85a; App. 2694-2791a.

STATEMENT OF THE CASE

(I) The Proceedings Below

In this class action ^{5/} plaintiffs charged that the TA's methadone policy violated 42 U.S.C. §1983 and the due process and equal protection clauses of the fourteenth amendment in that it denied governmental employment without rational justification. Plaintiffs also alleged that the TA's methadone policy violated Title VII of the 1964 Civil Rights Act since it had a disproportionately harsh impact on blacks and Hispanics and was unjustified by business necessity. App. 83a.

Extensive pre-trial discovery and stipulations resolved many relevant facts and limited the issues for trial. See "Compilation of Agreed to and Contested Facts Together with Plaintiffs' Submissions Regarding Documentation Contained in the Record," App. 154a (hereinafter "Compilation").^{6/} The trial, which involved fifteen days of testimony, focused on the primary areas of dispute between the parties, namely: (1) the nature of methadone maintenance treatment and its participants' performance abilities; and (2) the nature of TA employment. By agreement of the parties some testimony was taken in the form of written statements sworn to by the witnesses in open court where they were subject to cross-examination. See, e.g., App. 742-43a.

Plaintiffs called as witnesses many of the leading experts in the country on the medical aspects of methadone maintenance and the ability of methadone maintenance participants to work. First was Robert L. DuPont, Jr., M.D., Director of the President's Special Action Office for Drug Abuse Prevention and the National Institute on Drug Abuse, the federal government's coordinating agencies in the field of drug abuse

^{5/} Plaintiffs' motion to proceed as a class action under F.R. Civ. P. 23(b)(2) was granted by endorsement filed May 3, 1973 (App. 1a), and the class was finally defined as set forth in the Amended Complaint ¶11. App. 85a.

^{6/} The Compilation was based on proposed pretrial findings filed by the parties (App. 5a), and on facts obtained through discovery. Certain of the facts in the Compilation originally contested by the TA were later stipulated to. See Tr. of Proceedings, Oct. 22, 1974 and Feb. 12, 1974, App. 131a, and Update to Compilation, App. 246a. Both the Compilation and its update were admitted into evidence. App. 152-53a.

treatment and research. App. 513-81a. Dr. DuPont was followed by clinicians with direct experience treating methadone participants, and experts with specialized knowledge about methadone participants' medical condition, functional abilities, social rehabilitation and vocational experiences. App. 681-711a; 712-35a; 762-89a; 790-823a; 145-79a.

In addition to expert witnesses, plaintiffs presented testimony from a number of employers who had knowledge of the work performance of methadone maintenance participants in a wide variety of jobs, including highly skilled and safety sensitive positions. App. 736-61a; 1145-1241a.

Testimony was also received regarding the named plaintiffs' excellent records in methadone maintenance treatment, normal psychomotor and intellectual functioning, and outstanding job performance abilities. App. 590-680a; App. 706-11a.

The TA called only two medical witnesses — their medical director, a man with very limited knowledge about addiction and virtually no knowledge about methadone maintenance, and a pharmacologist who had never treated a methadone patient and whose only original scientific work in the field involved an unpublished study of rats. App. 1242-1313a; 1314-1450a.^{7/}

The court inquired extensively at trial into the nature of TA employment. However, despite this inquiry and a number of pre-trial stipulations by the parties, the court requested a tour of TA facilities to ensure that it had obtained a realistic picture of the performance and risks involved in different TA job positions. This tour, agreed to by plaintiffs and the TA, lasted some eight hours. The court and counsel inspected the TA's command center, clerical offices, tunnels, switching towers, stations, maintenance shops, yards and cleaning facilities. App. 1336-38a; Memo. of the Court Relating to Tour, App. 292a.

^{7/} Pharmacologist Lynch's "knowledge and experience...regarding methadone maintenance were so limited, that his testimony was of little value," the court found. 399 F.Supp. 1037, 1043, App. 370a, 376a. See also, e.g., App. 1385, 1388, 1392-93, 1399-1400, 1434, 1436, 1438-39; Dole on Lynch, App. 1523-43a.

Although both parties indicated after the tour that they had concluded their proof, the court expressed deep concern that the medical and other testimony was so disproportionately in plaintiffs' favor that perhaps it had not received a balanced and realistic factual picture.

App. 304-16a. This concern led to nine additional trial days:

I should note that after about six days of trial the parties advised me that they were virtually finished with the presentation of their evidence. However, I was concerned about what appeared to be a disproportionately one-sided array of proof. Plaintiffs had introduced the testimony of an impressive group of experts, corroborated by laboratory and other tests, to the effect that a former heroin addict properly "stabilized" on methadone is free of undesirable narcotic effects and is entirely normal as regards mental and physical capabilities. The evidence demonstrated that methadone maintained persons were successfully employed in jobs of many kinds.

As against this, the TA had brought forward a single expert witness, a pharmacologist, to present theories about certain adverse characteristics of methadone. However, the knowledge and experience of this witness regarding methadone maintenance were so limited that his testimony was of little value. The TA called its personnel director and medical director, who both testified to certain theories they held regarding methadone maintenance. However, these officials naturally lacked the depth of expertise possessed by plaintiffs' witnesses on this subject.

The situation raised a serious question as to whether all sides of the problems involved in the case had been thoroughly explored, or whether any negative aspects of methadone and methadone maintenance programs existed that had not been presented. I therefore requested the attorneys for the parties to submit proposals for further witnesses. The result was an additional nine days of trial at which exhaustive effort was made to probe the relevant questions with experts of varying points of view.

399 F.Supp. at 1037, App. 370a. During these nine days twenty-two additional persons were called, six as the court's own witnesses. These six were selected primarily because they had authored articles arguably critical of methadone treatment cited by the TA at trial,^{8/} or because they had been consulted by the TA regarding its methadone policy.

^{8/} The TA's attempt in its brief on appeal to substitute articles and similar materials for proof it failed to adduce at trial must be rejected. Indeed, similar efforts were rejected by the court below which insisted on calling experts who could testify as to the significance of such materials in relation to the issues in this case. See, e.g., Tr. of proceedings, Jan. 11, 1977, 85-6 ("We have found again and again and again that articles are completely unsatisfactory,...the only way to get expert opinion or facts into this case is through witnesses who can be examined and cross examined.") Thus, for example, testimony demonstrated that the Burden report (TA brief p. 10) was a political document researched by an untrained part-time law student employee and it provided no support for the TA's case. App. 1836-1900a. Similarly, the Dole article quoted out of context and cited by the TA (brief p.11) in no way undermines the 122 pages of testimony Dr. Dole gave directed to the facts here at issue. See App. 1483-1605a.

One, Harold Trigg, M.D., had for the past several years been the TA's only expert consultant on drugs. See Order Directing Certain Experts to Testify, App. 317a; see also, e.g., App. 1608-09a. The additional witnesses offered professional viewpoints spanning the spectrum of opinion on methadone maintenance treatment, described in detail the operations and clinical experiences of all the City's major methadone programs, and gave still more information regarding the TA's operations and the duties of its various employees.

(2) The District Court's Decisions

On August 6, 1975, the district court issued a lengthy opinion holding that the TA's absolute methadone policy violated 42 U.S.C. §1983 and the fourteenth amendment since it excluded participants in methadone maintenance treatment programs from non-sensitive job positions without rational relationship "to the safety needs, or any other needs, of the TA." 399 F.Supp. 1032, 1036; App. 365a, 369a. The court found it unnecessary to reach plaintiffs' racial discrimination claims. 399 F.Supp. at 1058-59, App. 391-92a.

Plaintiffs subsequently moved for a determination of their right to attorneys' fees under Title VII of the 1964 Civil Rights Act, and on May 5, 1976 the court issued a supplemental opinion holding that the TA policy also violated that statute since it had a disproportionately harsh impact on minority groups and was unjustified by business necessity. 414 F.Supp. 277; App. 397a.

A permanent injunction and judgment was entered on May 20, 1976 enjoining operation of the TA's policy, but deferring decision as to the relief to be afforded the named plaintiffs, and the amount of plaintiffs' attorneys' fees. The TA was ordered to reevaluate the employability of the named plaintiffs without regard to its unlawful policy. App. 395a.

The TA submitted its report on the named plaintiffs' employability, and plaintiffs responded with documentation regarding the relief that should be afforded both the named plaintiffs and the members of their class, including class member Wright. See memorandum and affidavits supporting plaintiffs' Motion to Supplement and Modify the Court's Order of May 20, 1976, filed September 28, 1976. Plaintiffs also moved for a determination

of the TA's liability for attorneys' fees under the recently enacted 1976 Civil Rights Attorneys Fees Awards Act. App. 408-42a.

After additional proceedings, the court held that plaintiffs were entitled to an award for costs and fees under the 1976 Act, as well as Title VII, and that the award should be in the amount of \$375,000. See Opinion (dictated into record), Jan. 13, 1977, App. 481a, 508-12a. The court further held that plaintiffs Diaz and Frasier were entitled to employment (in the positions of "maintainer's helper" and "bus cleaner"), but that Beazer, Reyes and Wright were not. App. 481a, 484a-506a. On January 28, 1977, the court entered an amended permanent injunction and judgment to this effect. App. 447a.

On this appeal, the TA seeks review of both the court's original and amended judgments. Plaintiffs have cross-appealed from only that part of the amended judgment that denied relief to Beazer, Reyes and Wright.

STATEMENT OF FACTS

After its exhaustive exploration of the facts, the district court concluded that the evidence overwhelmingly established that the TA's methadone policy was without rational basis:

Plaintiffs have more than sustained their burden of proving that there are substantial numbers of persons on methadone maintenance who are as fit for employment as other comparable persons.

No one can have the slightest doubt about the heavy responsibilities of the TA to the public, including their duty respecting the safety of millions of persons who are carried on its subways and buses. However, in my view, the blanket exclusionary policy against persons on methadone maintenance is not rationally related to the safety needs, or any other needs, of the TA.

* * * *

... [T]he crucial point made so strongly by plaintiffs' witnesses was never convincingly challenged—that methadone as administered in the maintenance programs can successfully erase the physical effects of heroin addiction and permit a former heroin addict to function normally both mentally and physically. It is further proved beyond any real dispute that among the 40,000 persons in New York City on methadone maintenance (as in any comparable group of 40,000 New Yorkers), there are substantial numbers who are free of anti-social behavior and free of the abuse of alcohol or illicit drugs; that such persons are capable of employment and many are indeed employed. It is further clear that the employable can be identified by a prospective employer by essentially the same type of procedures used to identify other persons who would make good and reliable employees. Finally, it has been demonstrated that the TA has ways of monitoring employees after they have been hired, which can be used for persons on methadone maintenance just as they are used for other persons employed by the TA.

This proof applies with equal, if not greater, force to those former heroin addicts who have successfully completed participation in a methadone program.

399 F.Supp. at 1036-37, App. 369-70a (emphasis added). The court's conclusions echoed determinations regarding the irrationality of the TA's methadone policy that had been made years earlier by the New York State Temporary Commission to Evaluate the Drug Laws,^{9/} the New York City Human Rights Commission^{10/} and the TA's own Impartial

^{9/} See Temporary State Commission to Evaluate the Drug Laws, Employing the Rehabilitated Addict, New York State Legislative Document No. 10 28-30 (1973); p. 15 infra.

^{10/} See Affidavit of Eleanor Holmes Norton, 49-53a.

Disciplinary Review Board.^{11/} As indicated below, they were based on extensive fact findings and a massive record in which there was virtually no conflicting testimony regarding the central facts at issue.

(1) The TA's Methadone Policy and the Basis for Its Adoption

As the district court found, the TA's methadone policy constituted a flat, across-the-board employment bar pertaining to every one of the TA's job positions:

...It is stipulated that no...permission has ever been given by the [TA's] Medical Director for the employment of a person using methadone.

The effect of this policy is that, if it is revealed that a current employee of the TA is a user of methadone, he will be discharged, or if an applicant for employment is a user of methadone, he will not be employed. This policy applies to all positions in the TA regardless of whether they are operating or nonoperating positions. Moreover, the policy operates as an absolute exclusion—no consideration being given to individual factors such as recent employment history, successful adherence to a methadone program, or evidence of freedom from heroin use.

399 F.Supp. at 1036, App. 369a. The evidence is that this indiscriminate policy was actually part of a more sweeping rule under which the TA refused to hire any person with any history of narcotic usage, even persons not in methadone treatment who had demonstrated years of freedom from illicit drug use. See Compilation, App. 165-71a.

The TA has never undertaken a serious review of the relationship of its methadone policy to its legitimate needs. Prior to trial the TA stipulated that it had "never studied the requirements of...TA jobs...to determine the...ability of...persons participating in methadone maintenance programs to perform the various jobs." Compilation, App. 172a.^{12/} The TA also ignored advice to the effect that methadone maintenance participants were qualified for employment, which it stipulated that it received from

^{11/} See p. 30 infra.

^{12/} See also App. 1041a (court noting TA hadn't made "its own review about the employability of methadone patients").

three leading drug treatment experts, the only such experts that it had consulted.^{13/}
 The TA's claim (brief p. 8) that it had received conflicting expert advice is without basis in fact. Compilation, App. 175-76a.

Testimony by Louis Lanzetta, the TA's medical director, established that in addition to not genuinely evaluating its methadone policy, the TA never even made an affirmative decision to adopt it. Instead, it simply continued an historic rule proscribing narcotic use by TA employees, and methadone maintenance was automatically included in that proscription without consideration being given to the difference between it and other narcotic use:

Q. Would you describe to me generally the process by which the policy of not hiring and not retaining in your employ ex-addicts was formulated...?

A. I couldn't tell you because it was there, I mean the thing is, you bring up a subject that I think no one was aware of drug addicts until lately, I think maybe when I became medical director, and it was one of the standards you know, that drug addicts or barbiturates or any dependent drugs, you would be disqualified.

* * * *

Q. Was there a policy on Methadone when you became medical director?

^{13/} These experts were Harvey Gollance, M.D., Director of the Beth Israel Medical Center; Vincent Dole, M.D., Professor of Medicine at Rockefeller University and Senior Physician to Rockefeller University Hospital; and Harold Trigg, M.D., chief of Drug Addiction Services at Beth Israel Medical Center and Associate Professor of Clinical Psychiatry at Mt. Sinai School of Medicine. Compilation, App. 175-76a. All three testified at trial as court's witnesses and all supported plaintiffs' case. App. 1483a-1675a; Trial tr. Feb. 3, 1975, 849-924.

A. Again, you bring up the word Methadone, it is a narcotic and as long as narcotics disqualify, Methadone would disqualify, it wouldn't have to be named Methadone, it is a narcotic.

App. 2432-33a. Dr. Lanzetta's testimony was confirmed by William Ronan, the TA's former chairman. E.g., App. 2655-56a ("That [a change in the methadone policy] was never discussed. It was the question of implementation of the existing policy.")

The TA tries to claim (brief p. 8) that its methadone policy was actually based on a review of the facts and not simply "preconceived notions". This claim was examined carefully by the court below and flatly rejected. Indeed since it was clear that the TA never had considered its methadone policy, the court offered the TA the opportunity to do so in the course of this litigation, and made clear that it was resolving the rationality of the policy only because the TA would not. Thus, a few months after this action was filed the court urged the TA to accept a proposal by the City Civil Service Commission under which the Commission and the TA would cooperatively study the feasibility of employing methadone maintenance participants in TA jobs. Since the TA appeared to agree to the study the court informally stayed proceedings to enable the study to go forward. At an early stage, however, it became clear that the TA did not intend to revise its methadone policy in accordance with the results of the study or to comply with any new medical qualifications for its job positions that might be promulgated by the Commission. The study was subsequently abandoned. App. 54a; 56a, 71a, 73a. As the court later observed, the TA's sole interest in the study had been to use it as a possible means of validating its existing exclusionary policy:

...There was a lot of evasion and it finally turned out there wasn't any objective study. All they were doing was...simply trying to persuade the [City] personnel department that there was enough backing for their preconceived notion and that's all.

They had no intention of reevaluating anything and that was admitted finally after a lot of questioning.

* * * *

If there had been a bona fide study undertaken we might never have had to try the case.

Tr. of Proceedings, January 13, 1977, 139, 141; see also App. 1034a.

When the TA was forced in defending this case to come up with some rationale for its policy it became clear that its resistance to employing methadone maintenance participants was based on gross misconceptions about methadone treatment and unreasoned prejudices against persons with addiction histories. Thus, the TA's Medical Director (Dr. Lanzetta) and its Executive Officer for Labor Relations and Personnel (Mr. McLaren) explained the TA policy on the grounds that "heroin addiction invariably stems from some character defect, making a person more or less permanently unemployable...." 399 F.Supp. at 1049; App. 382a. A host of supposed methadone "side-effects" were also alleged. E.g., App. 2490-91a.

The TA's image of methadone maintenance participants was described graphically by McLaren:

Let's take another part of the aspect of maturing as we're told about methadone. The problem of constipation, the problem of sweating, excessive sweating. The problem of impotence and the problem of insecurity. Now, we're advised that this is a maturing matter and that it continues, do you know what the problem of constipation is to a bus driver or motorman or a person working out on the tracks where there is no toilets around. They resort to laxatives and do you know what that means when they are driving a bus or a motorman. what does he do, use his hat, stop the train? We can't have that.

* * * *

You take a man that comes out of a shock — a shocking experience like being addicted to drugs and suddenly find he's sweating and impotent and constipated and he's unsure and uncertain. It is a harrowing experience.

As demonstrated infra pp. 18-26 the TA's image of methadone participants bears no relationship to reality.

(2) The Nature of TA Employment

Even though the court specifically ruled that the TA was not required to employ members of plaintiffs' class in sensitive positions^{14/} (App. 449a), the TA contends here,

^{14/} The court's decision to exclude safety sensitive work from the coverage of its judgment was based solely on an "abundance of caution." Jan. 13, 1977 Opinion, App. 498a; 399 F.Supp. at 1045, 378a. It was not based on any evidence indicating that methadone maintenance participants are not capable of entirely normal job performance. Indeed the evidence demonstrated they were fully capable of performing highly skilled work. See pp. 18-26 infra.

as below, that its across-the-board methadone policy is required by the unique safety needs of its system.

The court considered the validity of this contention as central to its decision. Accordingly it reviewed many stipulations made regarding the issue (App. 199-226a), heard the extensive testimony of TA officials (e.g., App. 1998-2069a; trial tr., February 12, 1975, 1256-1356, 1419-1459), conducted an on-site tour of TA operations (see p. supra; App. 287a, 292a) and examined masses of documentary material (e.g., App. 333a). In the end, the court concluded that most of the TA's jobs were not particularly safety-sensitive:

It is perfectly clear that large numbers of the employees in the TA perform work essentially similar to the type of work done in other businesses and industries where methadone maintained persons appear to be successfully employed. ^{15/}

399 F.Supp. at 1052-53, App. 385-86a. See also the court's detailed fact findings, 399 F.Supp. 1053-56, App. 386-89a.

(a) TA Job Positions and Employment Structure

The TA's 47,000 employees hold about 400 different job titles, the majority of which are non-operating positions involving tasks which are neither safety sensitive nor unique to the TA. 399 F.Supp. at 1053, App. 386a. Among the non-operating positions are, for example:

^{15/} The court's finding was in accord with an earlier determination made by the New York State Temporary Commission to Evaluate the Drug Laws. After an investigation of the TA's methadone policy the Commission found that the TA's "use of the term sensitive" to describe all its job positions was "entirely self-serving," and that it was a mere ruse to allow "prejudice against addicts...[to] overwhelm all other relevant considerations." Temporary State Commission to Evaluate the Drug Laws, Employing the Rehabilitated Addict, New York State Legislative Document No. 10 28-29 (1973).

	number		number
account clerks	25	clerks	664
accountants	54	collecting agents	145
architects	38	keypunch operators	57
attorneys	22	masons	198
bookkeeping machine operators	49	messengers	12
car cleaners	950	painters	679
caretakers	229	plumbers	207
carpenters	167	porters (janitors)	116 2
cashiers	32	stenographers	92
civil engineers	344	stock assistants	10 3
civil engineer draftsmen	27	stockmen	72
claim examiners	60	token sellers	41 45
		turnstile maintainers	1 4 1
		typists	223
		watchmen	162

About 3400 TA employees work in so-called "city-wide" civil service job titles and, by the TA's own stipulation, perform tasks that are essentially the same as those performed by persons employed in regular New York City agencies (where discrimination against methadone maintenance participants is expressly prohibited).^{16/} Compilation, App. 194a; 399 F.Supp. at 1052, App. 385a. In the TA's own job titles large numbers of employees also do obviously nonsensitive, and often menial, work. For example, the TA's 950 "car cleaners" do no more than sweep, wash and otherwise clean up subway cars. 399 F.Supp. 1054, App. 387a. Another 5600 persons work in the TA's subway stations,

^{16/} Under City Civil Service Commission medical standards which are applicable to the "city-wide" titles the members of plaintiffs' class are eligible for TA employment. The TA has evaded these standards, however, through use of the "one in three rule." 399 F. Supp. at 1052, 385a.

cleaning, selling tokens and repairing turnstiles. 399 F.Supp. 1056, App. 389a. And about 3000 persons are employed in the TA's various shops where, under supervision, they perform maintenance tasks like painting and body work on subway cars. 399 F.Supp. 1055, App. 388a.

Even TA job titles which may appear on their face to relate to sensitive tasks frequently do not. For example, not all "conductors" ride subway trains. Many simply stand on platforms where they help control passengers and give directions. 399 F.Supp. 1056, 389a; App. 2554-55a. Similarly, "motormen" may simply perform semi-clerical duties. App. 2512a.

Moreover, the TA has built into its employment system a variety of mechanisms to ensure against inadequate job performance. Before TA employees are hired they must go through a thorough background investigation, medical examination and civil service test (trial tr. Feb. 12, 1975, 1284-85, 1287-92, 1356). After being hired and as a condition of any promotion they must complete lengthy probationary terms during which they are subject to especially close supervision. App. 820-21a. Almost all TA non-operating employees work under the direct supervision of a foreman or supervisor. 399 F.Supp. at 1053-56; 386-89a. The system is also carefully structured to ensure that the more responsibility a job entails the more checks there are against poor performance. For example, entry-level positions are generally low-level unskilled jobs, and higher level jobs can be obtained only after years of satisfactory on-the-job performance. TA workers often must begin employment as "helpers" or "trainees" and perform under close individual supervision for a year or more before they are even eligible for promotion to more responsible levels. 399 F.Supp. at 1056, App. 389a; Memo. Relating to Structure of TA Employment, App 336a.

(b) TA policies Regarding Disabled Persons' Eligibility for Jobs

The fact that the majority of the TA's jobs are nonsensitive is reflected in its own employment policies respecting alcoholics, diabetics, epileptics and cardiac patients who concededly could create risks if employed in safety sensitive positions.

The TA stipulated below that, in contrast to its methadone policy, it does not maintain a blanket rule barring the employment of former alcoholics. Instead it considers the "hiring of such persons on an individual basis in light of factors such as their rehabilitation and the safety sensitivity of the job to which they seek appointment." Compilation, App. 216a. Moreover, the TA does not feel that its much heralded safety needs require it to dismiss active alcoholics discovered in its employ. Although drinking on the job or reporting unfit for duty by reason of drinking is a violation of TA rules, employees with three years of service are virtually never dismissed for an offense. 399 F.Supp. at 1056, 389a; Compilation, App. 217-18a. If a first offender works in a critical position he is transferred to less sensitive duties; if he works in a non-critical area he is suspended from work for a maximum of three days. About 50-60 percent of the TA's job positions are classified as non-critical for purposes of its alcoholism policy. E.g., App. 2518a. These positions include a wide variety of jobs like office work; maintaining subway track, tunnels and structures; and cleaning and repairing subway cars. 399 F.Supp. 1056-57; App. 389a, 390a.^{17/}

^{17/} For the court's findings about the TA's alcoholism policy see 399 F.Supp. at 1056-57, App. 389-90a. See also testimony of Joseph Warren, head of the TA's alcoholism counseling program, App. 2538a.

The TA also makes available an in-house counseling program to its employees with drinking problems. It is stipulated that the success rate of the counseling program "is only approximately 60% since some participants have relapses into drinking and some employees referred to the program drop out or refuse to participate. Nevertheless, persons who do not succeed in the...program are allowed to continue in the employ of the TA as long as their on-the-job performance remains adequate." Compilation, App. 220.

The TA also stipulated that employees in safety sensitive positions whose drinking problems have not been discovered by the TA may participate in the counseling program on a confidential basis. "Such enrollment is not reported to the employees' supervisors, and they are not required to accept a demotion in position...Persons have enrolled in the counseling service on a confidential basis while serving in such highly sensitive positions as motormen, towermen, dispatchers, and trainmasters." See Compilation, 200a; 399 F.Supp. at 1057, App. 390a.

About 2300-2400 employees currently participate in the TA's alcoholism counseling program. 399 F.Supp. at 1057, 390a.

The TA has also stipulated that it gives individual consideration to job applications from diabetics, epileptics and persons with heart disease. Compilation, App. 213-14a. Like alcoholics, TA employees from any of these groups would obviously pose a safety risk if all TA jobs were sensitive. For example, there was testimony at trial by an endocrinologist and Assistant Professor of Medicine at Columbia University that, even when in treatment, diabetics are in a good deal more physically unstable and dangerous condition than normal individuals. Diabetics are subject to comas, especially under stress, and they generally suffer serious vascular changes leading to a significantly increased incidence of strokes and heart attacks. App. 776-79a.

(3) The Suitability of Methadone Maintenance Treatment Program Participants for Employment at the TA

"Myths and misconceptions abound" concerning methadone maintenance treatment and the abilities of its participants. 399 F.Supp. at 1036-37, App. 369-70a. In concluding that the TA's policy was based on "a misunderstanding" regarding methadone, the court noted that the trial had afforded "a unique opportunity" to explore objectively the relevant issues in depth. Id. Testimony was heard from an extraordinary gathering of leading drug treatment experts, including both supporters and severe critics of methadone maintenance.

As indicated supra pp. 6-8, the district court's appetite for evidence was almost insatiable. After hearing virtually unchallenged testimony from plaintiffs' witnesses, it demanded that an additional array of persons be called so that every viewpoint could be heard and every relevant issue explored.

Finally, the court reached the following conclusions:

...[M]ethadone as administered in...maintenance programs can successfully erase the physical effects of heroin addiction and permit a former heroin addict to function normally both mentally and physically.

* * * *

...[A]mong the 40,000 persons in New York City on methadone maintenance (as in any comparable group of 40,000 New Yorkers), there are substantial

numbers who are free of anti-social behavior and free of the abuse of alcohol or illicit drugs.

* * * *

...[S]uch persons are capable of employment and many are indeed employed...[and] the employable can be identified by a prospective employer by essentially the same type of procedures used to identify other persons who would make good and reliable employees.

399 F.Supp. at 1037, App. 370a. These conclusions were, as the court found, based on essentially uncontroverted evidence. Thus despite the controversy over certain aspects of methadone maintenance treatment, there is no controversy among recognized experts as to either (1) the key facts relating to the employability of methadone maintenance participants, or (2) the irrationality of the TA's absolute exclusionary policy. It was for this reason, obviously, that the TA was unable to get a single expert of any standing to testify as its witness.

The TA in its brief has cited certain statements of the experts called at trial as alleged evidence of problems relating to methadone. Read in context these statements provide no support for the TA. Plaintiffs respectfully refer this Court to those witnesses' full testimony as set forth in the Appendix.

(a) The Origins and Rationale of Methadone Maintenance Treatment

The origins and medical rationale of methadone maintenance treatment were described primarily by Robert L. DuPont, Jr., M.D., the senior federal official in the field of drug abuse treatment and research,^{18/} and Vincent P. Dole, M.D., a Professor at Rockefeller University and Senior Physician to Rockefeller University Hospital.^{19/} Dr. Dole was called as a court's witness. See pp. 6-8 supra; App. 317a.

Fourteen years ago Dr. Dole and Dr. Marie Nyswander, a psychiatrist experienced in the treatment of heroin addicts, initiated an extensive study of heroin metabolism at Rockefeller University Hospital. The study demonstrated that former heroin addicts administered stable doses of methadone on a sustained basis show the alert behavior,

^{18/} Dr. DuPont was director of the President's Special Action Office on Drug Abuse Prevention and the National Institute on Drug Abuse. See DuPont Curriculum Vitae, App. 513a. His testimony appears at App. 524a-581a.

^{19/} See Dole Curriculum Vitae, App. 1480a. Dr. Dole's testimony appears at App. 1483a-1605a.

activity and interests of normal, non-addicted individuals. As a result of the Dole-Nyswander study, a pilot methadone maintenance treatment program was established at the Beth Israel Medical Center. E.g., 399 F.Supp. at 1039, App. 372a; 530-33a; 1485-92a.

At first dozens, then hundreds and eventually thousands of heroin addicts were admitted to methadone maintenance treatment at Beth Israel and numerous other medical facilities throughout the country. E.g., 399 F.Supp. 1039-40, App. 372-73a; 1496-99a; 533-34a; 576-77a. For many years now methadone maintenance has been the predominant form of treatment for heroin addiction in the United States. About 70,000 persons, roughly sixty percent of all former heroin addicts in treatment, are participating in methadone maintenance programs. About 40,000 of these reside in the New York City area. E.g., 399 F.Supp. at 1040; App. 373a; 576-77a.

The rationale for methadone maintenance treatment is simple. Heroin is a short-acting drug and must be taken several times a day to prevent narcotic withdrawal symptoms. Heroin addicts also tend to bounce every 3-4 hours from one physical state to another, going from a "euphoria" or "rush" immediately after a drug injection to lethargy and the onset of eventual withdrawal. In contrast to heroin, an adequate oral dose of methadone staves off withdrawal for a 24-36 hour period. Methadone maintenance participants also experience a stable physical state, feeling none of the ups and downs to which heroin addicts are subject. E.g., 399 F.Supp. at 1038-39, App. 371-72a. Furthermore, through their ingestion of methadone they develop a "cross tolerance" or "blockade" to the effects of other narcotics, so that the injection of even a large dose of heroin has no observable physical impact. E.g., 399 F.Supp. at 1039, App. 372a; 564a; 571-73a.

(b) The Effect of Methadone Maintenance Treatment on Its Participants' Work Abilities

At least seventeen witnesses testified regarding the abilities of methadone program participants. They concluded overwhelmingly that the majority of methadone maintained persons are fully suitable for employment.

(i) Physical Effects of Methadone Maintenance

The overwhelming weight of the evidence is to the effect that a methadone maintenance patient can perform normally, and that undesirable side effects are lacking. 399 F.Supp. at 1943, App.376a. (emphasis added)

At trial, the assumptions regarding methadone's physical effects which the TA claimed justified its policy were shown to be entirely without substance.

The directors of all the major methadone treatment programs in New York, together with Drs. DuPont and Dole, were called by plaintiffs or the court to testify regarding their direct clinical experiences with thousands of methadone participants. They agreed unanimously that, after a short initial period of adjustment, persons maintained on methadone exhibit no drug side effects of consequence and are entirely capable of normal functioning.^{20/}

These clinicians' conclusions were confirmed by evidence received about the extraordinarily systematic studies that have been done during the past fourteen years into every aspect of methadone treatment's physical impact. App. 545-56a; 550-51a; 684-99a; 722-28a; 734-35a; 772-76a; 1682- 99a; 1709-15a; 1722-23a. As the court noted, "there has been a remarkably intensive effort to test and observe methadone maintenance patients and to gather statistics about their performance." 399 F.Supp. at 1043, App. 376a. Testimony was given at trial by the leading researchers in the field.

Norman B. Gordon, Ph.D., the leading expert on methadone's impact on human performance^{21/} testified regarding sensitive laboratory studies that he and various colleagues have done over the past decade examining every conceivable measure of methadone participants' physical and intellectual functioning. App. 684a. In one series of tests, for example, participants who had been maintained on high doses of methadone for a year or longer were compared with college students, professional staff members, and other non-addict groups.^{22/} Among the functions tested were intellectual performance, psychomotor performance, learning a new skill, retention of a learned skill, visual reaction

^{20/} See, e.g., Testimony of Paul Cushman, M.D. (Director of St. Luke's Hospital Methadone Maintenance Treatment Program), App. 770-73a; Testimony of Joyce H. Lowinson, M.D. (Director of the Methadone Maintenance Treatment Program of the Albert Einstein College of Medicine), App. 2243-45a; Testimony of Robert L. DuPont, M.D., App. 544-53a; Testimony of Vincent P. Dole, M.D., App. 1513; Testimony of Seymour Joseph, M.D., App. 1923a; Testimony of Bernard H. Bihari, M.D., (Director of the New York City Methadone Maintenance Treatment Program), App. 2340-43a.

^{21/} Dr. Gordon is an experimental psychologist. At the time of his testimony he was Chairman and Professor of Psychology, Department of Psychology, Yeshiva University and Guest Investigator, Rockefeller University. See Gordon Curriculum Vitae, App. 681a.

time for simple tasks, visual reaction time for complex tasks and auditory reaction time. In not a single test did the performance of the methadone participants differ significantly from that of the comparison group. On the basis of his studies Dr. Gordon concluded that "maintenance on methadone results in no physical side effects that present barriers to any vocational activities." App. 684a.

Dr. Gordon's findings were confirmed by Richard D. Blomberg, an expert on human performance in safety-related environments who had conducted a major scientifically controlled study of methadone participants' ability to perform a complex task in non-laboratory settings.^{23/} App. 722a. This study, done for the National Highway Traffic Safety Administration, assessed the driving abilities of methadone maintenance treatment program participants. It demonstrated that their driving records are identical to the general population's (App. 724-28a), a finding with wide-ranging positive implications regarding methadone participants' abilities to perform highly skilled tasks:

Driving is one of the more complex psychomotor tasks that a normal human undertakes. It involves many aspects of motor performance, controlling a car...perceptual performance, decision-making, risk-taking and so forth. It is my opinion that anyone who can perform adequately in the driving task could perform in virtually any other safety-sensitive task such as operating machine tools, driving trucks and so forth... .

App. 734a.

In addition to exploring research on the effect of methadone maintenance on human function, the court called Mary Jeanne Kreek, M.D., (Senior Research Associate at Rockefeller University) as its own witness to testify about the medical safety of methadone maintenance and its long-term physiological consequences. App. 317a. Since 1964 Dr. Kreek has been involved in continuous medical research into the side effects of methadone maintenance (App. 1710-11a), making her the most knowledgeable physician in the country on the topic.^{24/} Dr. Kreek testified that her scrutiny of thousands of methadone maintained individuals, including some in treatment for as long as eleven years, revealed "no... unexpected adverse

^{22/} Gordon, Warner, and Henderson, "Psychomotor and Intellectual Performance Under Methadone Maintenance." Report to the Committee on Drug Dependence, National Academy of Sciences, National Research Council 5136 (1967); Gordon, "Reaction Times of Methadone-Treated Ex-Addicts," 16 *Psychopharmacologia* 337-344 1970; Gordon, and Appel, "Performance Effectiveness in Relation to Methadone Maintenance," *Proceedings, Fourth National Conference on Methadone Treatment* 425-27 (1972). For a listing of Dr. Gordon's other studies see App. 683a; 685-86a.

effects, side effects or any alterations of bodily function." App. 1715a. The only persistent medical complaints that she received from methadone participants related to constipation, increased sweating and decreased libido. She noted that all of these are common complaints in the general population (App. 1687-93a; 1709-10a), and that none constituted problems affecting the complainants' capacity for "normal functioning in whatever their daily activities would be." App. 1710a.

(ii) Demonstrated Job Performance Abilities of Methadone Maintenance Participants

Demonstrated job performance is perhaps the best measure of employability and, as the court found, "there is impressive evidence about successful employment among methadone patients." See, e.g., 399 F.Supp. 1047-48, App. 380-81a.

Many methadone participants (thirty percent in some methadone programs) are already employed at the time they enter treatment. Others are employed in a matter of weeks. And the majority in many methadone programs are employed within a year. 399 F.Supp. at 1047-48, App. 380-81a.

The evidence is that most methadone maintenance participants succeed in obtaining and performing jobs without their drug treatment histories ever being an issue. This was testified to by Seymour Joseph, M.D. (Deputy Commissioner of the New York State Drug Abuse Control Commission and a court's witness):

[T]hese people...are doing magnificently in the work force across the entire gamut....Most of the people with whom they work do not know they are participating in methadone treatment programs. They have no awareness of it, just as I am sure...there are many people in the agencies that are involved in this suit that too have numerous participants in methadone treatment programs, but they are non-visible....

App. 1919-20a. Dr. Joseph's testimony was confirmed by a number of other witnesses. They and Dr. Joseph listed examples of "non-visible" employment positions successfully held by methadone maintenance participants which ranged from machine workers to truck drivers to attorneys. E.g., App. 2170a; 2228-29a; 2306-07a.

Evidence was also received about methadone participants' successful work experience under referral relationships that methadone programs have established

with many willing employers in the New York City area—including, for example, Chemical Bank, New York Life Insurance, Metropolitan Life Insurance, J.C. Penney, McGraw-Hill, Seagram, Columbia Presbyterian Hospital, Consolidated Edison, New York Telephone and the Off-Track Betting Corporation. 399 F.Supp. at 1032, App. 380a; App. 795-96a; 1175-88a. A number of these employers testified at trial.

An official of the Sheet Metal Workers Union testified that his organization had accepted methadone maintenance participants into an occupation involving the use of welding equipment and hazardous machinery, often at great heights with little or no supervision. Their job performance had been "uniformly excellent" and indistinguishable from drug-free individuals. App. 736-40a.

A vice president of the Off-Track Betting Corporation (OTB), testified about the experience that OTB had had with two of its offices staffed entirely by ex-addicts, about half of whom were maintained on methadone. App. 1207-10a. Even though they were specifically selected from an ex-addict group considered as "hard core employable," the performance of their offices was "indistinguishable from other OTB branches." App. 1207a, 1209a. On the basis of this experience, OTB had concluded that methadone maintenance treatment was not a reason to disqualify a person from work with large amounts of cash in an essentially unsupervised high stress situation." App. 1209a.

The assistant vice president and medical director of the Consolidated Edison Company testified that Con Ed had knowingly hired about 100 former addicts, many of whom were methadone maintenance participants. These employees worked in a wide variety of positions and were eligible for advancement along normal promotional lines. Con Ed believed its experience with former heroin addicts had been successful, and a controlled study of the work performance of methadone maintained employees indicated that it was as good as or better than average. 399 F.Supp. at 1047, App. 380a; App. 1145-48a.

The favorable testimony of these and other employer witnesses (App. 746-61a; [Chemical Bank]; App. 1156-57a [Benz-O-Matic Corporation]; App. 1170-73a. [Kennecott Copper Company]) was uncontroverted. The TA did not produce a single witness

who through direct experience had reached negative conclusions about the work abilities of methadone participants.

(4) The TA's Ability to Screen Methadone Maintenance Participants for Employment

(a) General Employability of the Methadone Maintenance Population

The TA tried below to justify its absolute exclusionary policy by claiming that almost all methadone participants are unemployable because they have continuing substance abuse problems. The evidence demonstrated that this position was unsupported:

...the strong majority of methadone maintained persons are successful, at least after the initial period of adjustment, in keeping themselves free of the use of heroin, other illicit drugs, and problem drinking.

399 F.Supp. at 1047; App. 380a. See also 399 F.Supp. at 1048, App. 381a ("[T] here can be no real dispute about the fact that substantial numbers of methadone maintenance patients are capable of successful employment.") Moreover, there was evidence that after a period of time in treatment the counseling and other services that methadone participants receive actually makes them "probably more employable [as a group] than...[a] comparison group" of individuals from similar deprived cultural backgrounds. App. 1584a.

(b) Ability to Determine Employability of Particular Methadone Maintenance Participants

Q. Can participants in methadone maintenance treatment programs be screened for job reliability with the same degree of certainty that...the non-drug user walking in off the street can be screened for job reliability?

A. The answer is yes, and I think you actually have more—the employer has more knowledge about him as a potential [employee] because of the potential involvement of the treatment agency in making those judgments. So actually he has more information on which to base his judgments than he would for somebody who is coming off the street. App. 558a.

Robert L. DuPont, Jr., M.D., senior federal official in the field of drug abuse treatment and research.

"Intensive inquiry" by the district court established that the TA and its existing medical staff is capable of selecting "methadone maintained patients [for jobs] in basically the same way as...other prospective employees." 399 F.Supp. at 1048, App.

381a; App. 1798a; 1831a. Indeed, due to the extensive screening information available from methadone treatment programs the TA can be more assured of the employability of particular methadone maintenance participants than other job candidates.

The TA's routine employee screening procedures include written, physical, and medical examinations, and probationary performance evaluations. 399 F.Supp. at 1048-49, App. 381-82a; Memo. Relating to Structure of TA Employment, App. 336a. For positions involving skilled work or high level responsibility the TA also demands recent, directly related prior work experience. *Id.* All these normal selection standards could clearly be applied to choose only fully suitable methadone maintenance participants for the TA's workforce.

Moreover, under the court's judgment, the TA is free to impose any additional job-related selection criteria with respect to methadone maintenance participants it deems appropriate, specifically including a requirement that applicants have had successful treatment records for a year or other time period. App. 448-49a. Among these criteria could be a detailed evaluation of employability from the particular methadone program involved. The evidence is that such evaluations would enable the TA to know far more about methadone job applicants' employability than it does about other persons'.

Under federal law, methadone participants are required to visit their treatment programs at least six days each week for their first three months in treatment. The frequency of these visits may be reduced gradually over a period of two years but at no time to less than twice per week. App. 3163a, 3146-47a. At their program visits participants are closely observed by professional personnel, randomly given urinalyses to check for drug abuse (at least once weekly under federal and state law), and engaged in a program of vocational and personal counseling. *E.g.*, 399 F.Supp. at 1041-42, App. 374-75a; 535-39a; 2198-2203a; 2327-32a; 2140-41a; 2166-67a; 2107-10a. The result is that methadone programs have a wealth of information about their participants' dependability that is potentially available to employers. As the court noted in discussing plaintiff Diaz, methadone maintainees are "under scrutiny far greater than is usually given almost

any other human being in normal walks of life." App. 503a.

Even some of the most outspoken critics of methadone treatment admit that the information methadone programs have about their participants far exceeds that which is available when an employer normally selects a job candidate. For example, Irving Lukoff, a court's witness and the person largely responsible for an apparently critical article regarding methadone that had earlier concerned the court, testified:

In every [methadone] program they have much more information than most personnel people have in the ordinary course of their selection of people. They know whether they have been abusing the drugs in the program. They know their criminal histories. They have had contact with them on a weekly, sometimes daily basis for many months, and they have a great deal of information to understand the individual.

App. 836a. Lukoff's testimony was confirmed by Dr. Dole^{25/} and by Mitchell Rosenthal, M.D., both also courts' witnesses. Trial tr., Jan. 10, 1975, 420-21.

The TA's claim that methadone programs are prohibited from providing adequate information to employers (brief Pp. 5-6) is baseless. The governing federal regulations were specifically designed to permit employers to obtain the information needed for rational employment decisions. App. 362-64a; 3185a; 399 F.Supp. at 1050-51, App. 383-84a. And when employers have sought information from methadone programs out of a genuine willingness to hire their participants the programs have responded with a great degree of cooperation, providing information both on a pre-employment and follow-up basis. E.g., 399 F.Supp. at 1050, App. 383a. The range of information released to employers was described at length by Eileen Wolkstein, Director of Vocational Rehabilitation for the Beth Israel Medical Center. App. 797-99a. And the effectiveness of employer/treatment program relationships such as Wolkstein described was underscored by Con Ed's medical director, who stated that he had dealt with a number of treatment programs and had never been denied any information requested including reports of regular tests for drug abuse. App. 1154-55a.

^{23/} Blomberg is an industrial and management engineer. See Blomberg Curriculum Vitae, App. 712a.

^{24/} See Kreek Curriculum Vitae, App. 1676a. For a sampling of the reports of Dr. Kreek's research see id at pp. 1678-80a.

(5) The Plaintiffs

The patent irrationality of the TA's methadone policy is graphically illustrated by the individual cases of the named plaintiffs and class member Wright. Each of these men had finally recovered through methadone maintenance treatment from the heroin habits that had plagued them for years. Each was clearly suitable for TA employment according to any normal job-related criteria, and three had proven their worth by years of satisfactory on-the-job performance at the TA. Expert testimony confirmed that their functional capabilities were in no way impaired by methadone treatment. App. 707-11a. Yet each was dismissed from or denied a TA job solely on the basis of his status as a methadone maintenance participant.

The court did decide that three of the plaintiffs,—Beazer, Reyes and Wright—were not entitled to reinstatement because they had breached a TA heroin rule by virtue of their prior addiction. See pp. 8-9 *supra*. This ruling is the subject of plaintiffs' cross-appeal. What is key here, however, is that the court made clear that all of the five plaintiffs were fully rehabilitated and had fine work records, and that their methadone maintenance participation in no way impaired their job suitability.

In its brief the TA has advanced a number of post hoc rationalizations in an attempt to demonstrate that these five plaintiffs are unsuitable for employment. What the TA has failed to mention is that the district court carefully considered all these same rationalizations and — after the receipt of extensive testimony and documentary evidence both during and after trial — concluded in its January 13, 1977 opinion that they were clearly made in bad faith.^{25/} App. 483-506a. As indicated below, the court's conclusions were compelled by the record.

(a) Carl A. Beazer

Beazer served with the TA for eleven and one-half years, working his way up through

^{25/} "You know more about a man coming to a methadone clinic than virtually any other contact that you will have with another human being." App. 1576a.

^{26/} See, e.g., p. 62 *infra*; memorandum and affidavits supporting plaintiffs' Motion to Supplement and Modify Court's Order of May 20, 1976, filed September 28, 1976.

a competitive civil service examination process from the position of car cleaner to conductor to towerman. 399 F.Supp. 1033, App. 366a; App. 235-36a.

Then, in 1971 a TA hearing referee recommended that Beazer be dismissed solely because he had been discovered to be participating in the Veterans Administration methadone maintenance program. App. 236a. This recommendation was appealed to the TA's Impartial Disciplinary Review Board. The Review Board has no power to alter TA personnel policies and accordingly could not overrule the referee's recommendations. However, the Board unequivocally determined that Beazer had had a good TA performance and disciplinary record and strongly recommended that the TA reevaluate its methadone policy with respect to him and others:

Carl A. Beazer has been with the Authority since May 11, 1960. During the approximately 12 years that he has been employed, he has compiled a good record. He started out as a Car Cleaner and worked his way up to Towerman. He has done his job well and has received a relatively few cautions and warnings for the time that he has been employed.

Beazer was a user of heroin. He realized that by continuing to use this drug he would ruin his future. Consequently, he sought help. Through the Veterans Administration, he became a participant in a methadone program. From all of the evidence presented, it would appear that Mr. Beazer handled his job competently while participating in the methadone program.

* * * *

This Board has great sympathy and admiration for Mr. Beazer. He realized that he had a problem and he did something constructive about it. The Board, however, does not make the rules and regulations of the Transit System. ... Here, the facts speak out that Mr. Beazer has violated a rule and, in accordance with a long-standing policy of the Transit System, must be dismissed.

The Board feels that it is incumbent upon the Union and the Authority to reconsider the rules and practices of the Transit System as it relates to drug users. They should particularly examine the merits of the relatively new methadone program. Perhaps, through their careful consideration of the drug problem as it relates to the employees of the Authority, they will find a way to help employees, such as Carl Beazer, who have struggled so valiantly and well to overcome the drug habit.

App. 2691-93a. Despite the Board's recommendation, Beazer was dismissed. App. 237a.

Since his dismissal Beazer has performed well in a number of highly responsible job positions. App. 487a; 399 F.Supp. at 1034, App. 367a; App. 632a. Beazer detoxified

from methadone almost three years ago, and the "uncontradicted evidence is that...[since] the early days of his methadone treatment... he has been entirely free of heroin or other illicit drug use..." 399 F.Supp. at 1034, App. 367a.

In its January 13, 1977 decision, the court ruled that Beazer was not entitled to reinstatement but made clear that its decision was based solely on the fact of his prior heroin usage and not on any of the other reasons advanced by the TA as evidence of his unsuitability for employment:

Beazer has had a really outstanding record of rehabilitation. He testified at the trial of this case about his vigorous efforts to keep employed since the time of his Transit Authority dismissal and he has risen to responsible supervisory positions in the building maintenance work and has done volunteer work of various kinds. So there is really no doubt in my mind about Beazer's rehabilitation, his present freedom from illicit drug use.

* * * *

My ruling is that Beazer has no...right to be reinstated...I base this ruling solely on...violation of the Transit Authority rule against narcotic usage in that Beazer was a heroin addict while occupying positions at the Transit Authority....

App. 487-88a.

(b) Jose Reyes

Reyes worked for the TA for almost four years, achieving a promotion through the competitive civil service process from the position of Maintainer's Helper to Ventilation and Drainage Maintainer.^{27/} See 399 F.Supp. 1034, App. 367a. At no time during Reyes' employment with the TA was he ever cited for an operational deficiency in his work performance. App. 2980a. Nonetheless, in 1972 Reyes was dismissed solely as a result of the TA's having discovered that he was participating in a Beth Israel methadone maintenance program. Beth Israel App. 129-30a; 399 F.Supp. 1034, App. 367a.

Since his dismissal, Reyes has been employed as a social health advocate

^{27/} The court found that the position of Ventilation and Drainage Maintainer (involving the repair of fans and pumps) was not safety sensitive. App. 491a.

at Mt. Sinai Hospital. App. 677a; 399 F.Supp. 1034, 367a. His job superior testified that his work performance had been "excellent," ranking him as "one of the better social health advocates in the whole program at the hospital." App. 678a.

According to the "uncontradicted evidence", Reyes also has an excellent drug treatment history. 399 F.Supp. 1034, 367a. He detoxified from methadone in January, 1975 and has been drug-free since.

(c) Nathaniel Wright

For five years Wright worked for the TA as a painter. App. 400a. In 1976 the TA discovered that Wright was enrolled in the New York City Methadone Maintenance Treatment Program, and he was dismissed for that reason. App. 400-03a.

Wright's program physician, Daniel Redner, informed the court that since entering treatment Wright had shown no evidence of illicit drug use and was a "model patient." App. 404-06a. Based on Wright's behavior in the program, and his evident "maturity" and "reliability," Redner said that he would offer his "highest recommendation of...[Wright's] capacity to perform as a responsible employee." App. 406a. Wright detoxified from methadone in July, 1976 and since that time has been totally drug-free. App. 402-03a.

Since his dismissal from the TA Wright has been unable to obtain other employment. He and his family of four are currently on welfare. App. 402a.

(d) Francisco Diaz

Diaz applied in 1970 for a position as a sheet metal worker and was rejected solely due to his participation in a Beth Israel methadone program. This rejection occurred despite the fact that Dr. Trigg of Beth Israel (later retained by the TA as its expert drug abuse consultant) had submitted a letter stating that Diaz was an "excellent patient and totally free of illicit drug use." 399 F.Supp. 1035, App. 367-68a; App. 239a. Immediately prior to applying to the TA Diaz had been employed for eight years as a sheet metal worker performing tasks directly comparable to those involved in the TA position. 399 F.Supp. 1035, App. 368a; App. 647a.

The TA claims here that Diaz' rejection was justified on the same grounds advanced to the district court and rejected by it as being both without merit and demonstrative of the TA's bad faith effort to evade the effect of the court's judgment. App. 500a. Thus while the TA characterizes Diaz' recent employment record as "checkered" the court found on the basis of overwhelming evidence that it was commendable. E.g., Opinion, Jan. 13, 1977, App. 501-02a.

The court also heard extensive testimony with regard to the TA's claim, urged again on this appeal, that Diaz' methadone maintenance program record was "spotty." App. 656-62a; 2138-50a; 2104-28a; 2076-83a; 2271-76a. Again the court determined that the TA's claim was groundless since Diaz' methadone record had in fact been excellent. App. 502-05a. Diaz detoxified from methadone maintenance in May, 1976, and since that time has been entirely drug free. App. 499-500a.^{28/}

(e) Malcolm Frasier

In April, 1973 Frasier applied for a position with the TA as a bus cleaner but was rejected solely because he had a former history of participation in methadone maintenance treatment. 399 F.Supp. 1034, App. 367a. (Frasier had been a methadone maintenance participant from October, 1972 to March, 1973).^{29/}

Over the last thirteen years Frasier has had an extensive work history as a taxicab driver, truck driver and shipping clerk. 399 F.Supp. 1034, App. 367a. As the court found:

^{28/} In its brief the TA claims that Diaz is also unsuitable for employment because of his conviction for "possession of a hypodermic needle." The court specifically found that Diaz has only been convicted of one offense in his lifetime—disorderly conduct. This offense occurred twenty years ago while Diaz was a heroin addict. Since that time he has not been so much as arrested. App. 500-01a.

^{29/} The TA attempts to indicate in its brief that Frasier was rejected for employment in 1973 because his period of time in methadone maintenance treatment had not been long enough. In light of the TA's absolute methadone policy this obviously is not true. Moreover, in its recent report to the district court the TA indicated that Frasier is still not suitable for employment despite the fact that he has been drug-free for three years. App. 495-96a.

There is no indication that Frasier lacks the physical or mental capacity of being a car cleaner. There is not the slightest indication of a lack of proper work habits. There is no indication of any illicit drug use or even methadone use for a period of years.

App. 496a.^{30/}

^{30/} in its brief the TA refers to Frasier's single heroin possession conviction as a basis for his lack of employability. What the TA fails to mention is that the offense was for attempted possession of less than an eighth of an ounce of heroin and occurred while Frasier was a heroin addict. App. 496a.

ARGUMENT

I

THIS COURT MUST AFFIRM THE DISTRICT COURT'S HOLDING THAT THE TRANSIT AUTHORITY'S POLICY VIOLATED THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT IN THAT IT BORE NO RATIONAL RELATIONSHIP TO ANY LEGITIMATE NEED

The exclusionary policy here is absolute and extraordinarily broad . All persons maintained on methadone are permanently barred from TA employment, no how long they have been free of illicit drugs, and no matter what evidence demonstrates their rehabilitation and suitability for employment. All the TA's 47,000 job positions are covered, no matter how unrelated to the safe operation of the transit system. The effect of the policy is to permanently bar a class of persons from a major sector of the local economy, and from jobs whose range is so broad as to include the kinds of tasks typically performed by most workers in our society.

The rationale advanced by the TA in defense of this policy was based on myths about the nature of methadone maintenance treatment which the trial demonstrated had no basis in reality. Moreover, the court concluded that the TA had never really considered the rationality of its methadone policy, notwithstanding clear indications that it was resulting in the rejection or discharge from employment of obviously qualified persons. Indeed, the TA deliberately closed its eyes and ears when offered a number of opportunities to learn about the real nature of methadone maintenance and about the performance abilities of methadone maintenance participants.

Having heard evidence concerning every conceivable rationale for the TA's policy, the court found on the basis of the overwhelming and essentially uncontroverted evidence that it had no rational basis:

[T]he blanket exclusionary policy against persons on methadone maintenance is not rationally related to the safety needs, or any other needs, of the TA.

399 F. Supp. at 1036; App. 369a.^{31/}

As set forth below, the court was clearly correct in concluding that such a policy violated the due process and equal protection clauses of the fourteenth amendment.

A. Irrationality of the TA's Policy as a Denial of Due Process and Equal Protection

The TA's methadone policy violates the equal protection and due process clauses of the fourteenth amendment in that it irrationally excludes a broad and undifferentiated class of persons from a wide range of vocational opportunities, and renders them permanently ineligible for employment in a major sector of the local economy.^{32/}

In numerous directly comparable cases, courts have struck down as violative

^{31/} Given the district court's ruling that the TA's policy is totally lacking in rationality and hence fails to meet the least stringent standard of constitutional scrutiny, this Court need not reach the question of whether a more stringent standard of review is applicable. Nonetheless it is clear that this case involves many of the same considerations which have in fact led courts to apply stricter standards.

Ex-addicts constitute an identifiable class, overwhelmingly composed of minorities (see Point II *infra*), which clearly suffers from the same type of discrimination and lack of ability to mobilize the political process as do classes such as aliens, illegitimate children and racial groups that have been described by the courts as "discrete and insular" minorities in need of "extraordinary protection from the majoritarian political process." United States v. Carolene Products Co., 304 U.S. 144, 152-53 (1938). See e.g., Interim Report of the Temporary State Commission to Evaluate the Drug Laws, Employing the Rehabilitated Addict, (New York State Legislative Document No. 10, at 27 (1973) (Plaintiffs' trial exhibit 18) ("widespread irrational discrimination on an unyielding and categorical basis"); Affidavit of Eleanor Holmes Norton, App. 49a; Brecher, Licit and Illicit Drugs 148 (1972) ("systematic discrimination against [former addicts]").

Furthermore, the right to earn a livelihood has long been recognized as an interest meriting special attention by courts. Truax v. Raich, 239 U.S. 33, 41 (1915) ("It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure.") Hampton v. Mow Sun Wong, 426 U.S. 88, 102 (1976) ("ineligibility for employment in a major sector of the economy" characterized as an important "liberty" interest).

^{32/} See, e.g., Schwabe v. Board of Bar Examiners, 353 U.S. 232, 238-39 (1957) ("A State cannot exclude a person from...any... occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment"); Slochower v. Board of Higher Education, 350 U.S. 551, 556 (1956) ("[C]onstitutional protection...extend[s] to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory"); Weiman v. Updegraff, 344 U.S. 183, 192 (1952).

of due process unreasonable criteria that had been used to bar persons from public employment. For example, in Thompson v. Gallagher, 489 F.2d 443 (5th Cir. 1973), the court held that dismissal from a position at a city diesel plant pursuant to a statute that barred employment of any veteran with a less than honorable discharge violated the plaintiff's due process rights:

The question is whether the challenged statute is a rational means of advancing a valid state interest. A regulation not reasonably related to a valid government interest may not stand in the face of a due process attack.

489 F.2d at 447.^{33/}

Many other courts have held that a policy which, like the TA's, denies an entire class of persons employment for reasons which bear no rational relationship to a legitimate state interest, violates equal protection. Thus in Armstead v. Starkville Municipal Separate School District, 461 F.2d 276 (5th Cir. 1972), the Fifth Circuit struck down a policy of turning down all teaching applicants who failed a written exam that

^{33/} See also Slochower v. Board of Higher Education, 350 U.S. 551 (1956) (automatic discharge of employee invoking privilege against self-incrimination violates due process); Norton v. Macy, 417 F.2d 1161, 1165 (D.C. Cir. 1969) (holding blanket disqualification of homosexuals invalid); Osterman v. Paulk, 387 F.Supp. 669, 670 (S.D.Fla. 1974) (requirement that all job applicants verify they had not used marijuana in the past six months violates principle that "In the field of public employment the government must act in a manner which is neither arbitrary nor unreasonable"); Baker v. Columbus Mun. Separate School Dist., 329 F.Supp. 706, 722 (N.D.Miss. 1971), aff'd, 462 F.2d 1112 (5th Cir. 1972) (cut-off score requirement on National Teachers' Exam was "an arbitrary and unreasonable qualification").

The plaintiff class plainly has both a "liberty" and a "property" interest in TA employment under New York law. Thus N. Y. Civil Service Law §75 provides that tenured civil servants "shall not be removed or otherwise subjected to any disciplinary penalty ...except for incompetency or misconduct..." And Article 5, §6 of the N. Y. State Constitution provides that "[A]ppointments...in the civil service...shall be made according to merit and fitness." Cf. Slochower supra (tenured employee has property interest safeguarded by due process); Perry v. Sindermann, 408 U.S. 593, 601 (1972) (non-tenured teacher claiming "de facto tenure" held to have property interest since "'property' denotes a broad range of interests that are secured by 'existing rules or understanding's").

the court found to be "not reasonably related to the purpose [of choosing good teachers] for which it was designed." The court held:

Starkville has created an absolute classification among the teachers seeking reemployment and among those applying for initial employment....Although Starkville may have discretion to establish an appropriate classification, the classification must not be an arbitrary one....

^{34/}
461 F.2d at 280.

The TA's policy is particularly egregious in that it applies to a broad class of persons and excludes them from a wide variety of vocational opportunities ranging from menial and unskilled through semi-skilled jobs. This absolute policy is maintained notwithstanding what the court below termed "overwhelming evidence" that substantial numbers of methadone maintainees are capable of performing normally and that the TA can easily identify such persons using its regular personnel procedures. This kind of refusal by employers to tailor employment policies to meet their legitimate needs has incurred the special disfavor of courts. Thus the Supreme Court has condemned employment rules that "sweep indiscriminately," applying to the "'sanitation man, class B,...' to the typist, and to the office worker,

^{34/} See also Foster v. Mobile County Hospital Board, 398 F.2d 227, 230 (5th Cir. 1968) (admission to practice in county hospital only of members of county medical society invalid since "distinctions which are drawn must in some way relate to the purpose of the classification made"); Georgia Ass'n of Educators, Inc. v. Nix, 407 F.Supp. 1102, 1108 (N.D. Ga. 1976) (three judge court) (exclusion of teaching applicants failing to attain certain score on National Teachers' Exam invalid since "classifications of persons to be accorded...different treatment cannot be made upon arbitrary criteria"); Thompson v. Gallagher, 489 F.2d 443 (5th Cir. 1973) (disqualification of all persons with less than honorable army discharges invalid); Richardson v. Civil Service Comm'n, 387 F.Supp. 1267 (S.D.N.Y. 1973) (education and test score requirements invalid); Carr v. Thompson, 384 F.Supp. 544 (W.D.N.Y. 1974) (disqualification of applicant for public works position on basis of arrest and conviction history invalid).

as well as to the person who directly participates in the formulation and execution of important state policy." Sugarman v. Dougall, 413 U.S. 634, 643 (1973) (striking down New York statute barring all aliens from the civil service). Similarly, in Butts v. Nichols, 381 F.Supp. 573 (S.D. Iowa 1974), the court in striking down a statute which absolutely barred ex-felons from all civil service positions noted:

There is no doubt that the State could logically prohibit and refuse employment in certain positions where the felony convictions would directly reflect on the felon's qualifications for the job....The Iowa statutory scheme, however, has an across-the-board prohibition....There is simply no tailoring in an effort to limit these statutes to conform to what might be legitimate state interests.

381 F. Supp. at 580. This Court also recently expressed strong doubt as to whether it would be constitutional to exclude ex-felons from employment as teachers other than on an individual basis, noting that exclusion from a range of opportunities

can be justified only after a detailed and particularistic consideration of the relationship between the person involved and the purpose of exclusion.

Pordum v. Board of Regents, 491 F.2d 1281, 1287 n. 14 (2d Cir. 1974), cert. denied, 419 U.S. 843 (1974).^{35/}

^{35/} See also Hampton v. Mow Sun Wong, 426 U.S. 88, 102-03 (1976) ("[I] neligibility for employment in a major sector of the economy is of sufficient significance to be characterized as a deprivation of an interest in liberty. Indeed we deal with a rule which deprives a discrete class of persons of an interest in liberty on a wholesale basis."); Crawford v. Cushman, 531 F.2d 1114, 1122 (2d Cir. 1976) (mandatory discharge of pregnant marines "simply not constitutionally tailored" to promote Marine Corps' interests in general mobility and readiness); Thompson v. Gallagher 489 F.2d 443, 449 (5th Cir. 1973) ("However, a general category of 'persons with other than honorable discharges' is too broad to be called 'reasonable' when it leads to automatic dismissal from any form of municipal employment. We have no hesitancy in calling the ordinance which bars that class of persons from city employment, without any consideration of the merits of each individual case, irrational...[T] he ordinance being challenged might stand in a very different light if it were part of a general comprehensive scheme which enumerated characteristics deemed to be conducive to competent performance...and which excluded all those who lacked those characteristics"). Osterman v. Paulk, 387 F.Supp. 669, 672 (S.D. Fla. 1974) ("[T] he Board may not adopt regulations that are overly broad."). Cf. Shelton v. Tucker, 364 U.S. 479 (1960) (Legitimate state needs cannot be pursued by overbroad means.).

The TA's policy of not differentiating methadone maintained ex-addicts from active narcotics users, and denying employment to both groups on the ground of "drug abuse," also imposes upon members of plaintiffs' class a badge of infamy which severely limits their prospects for employment even outside of the TA. In a number of cases courts have held that the constitutional restraints on a government employer's policies may be greater where, as here, reliance on a certain characteristic as a basis for a negative employment decision is likely to stigmatize an individual. Thus in invalidating a dismissal from employment based upon a policy barring homosexuals from the work-force, the D.C. Circuit noted:

These constitutional limits may be greater where, as here, the dismissal imposes a "badge of infamy," disqualifying the victim from any further Federal employment, damaging his prospects for private employ, and fixing upon him the stigma of an official defamation of character.

Norton v. Macy, 417 F.2d 1161, 1164 (D.C. Cir. 1969)^{36/}

The one case cited by defendants in support of their legal position (brief p. 18) is inapposite. In Hodgson v. Greyhound Lines, Inc., 499 F.2d 859 (7th Cir. 1974), cert. denied, 419 U.S. 1122 (1975), an exclusionary policy based on age was upheld solely with respect to the position of bus driver which the court found to be highly safety-sensitive. The decision in Hodgson was made on the basis of extensive evidence demonstrating that the defendants had considered the actual ability of the group excluded to perform the specific tasks at issue. No comparable evidence has been or could be produced here. But the central point is that the decision below is entirely consistent with Hodgson

^{36/} See also Saal v. Middendorf, 45 U.S.L.W. 2409 (N.D. Cal. Feb. 8, 1977); Birnbaum v. Trussell, 371 F.2d 672, 677 (2d Cir. 1966) (procedural due process case noting that "[T]he courts have become more inclined to consider the causes of discharge and the methods and procedures by which a dismissal is effected as it may bear upon reputation and the opportunity for employment thereafter.").

since Judge Griesa specifically held that the TA might maintain its policy with respect to the position of bus driver, as well as to any other job it deemed genuinely sensitive (including, e.g., motorman, conductor, towerman, and jobs dealing with high voltage equipment). 395 F.Supp. at 1058; App. 391a.

B. Uniquely Harsh Policy Towards Methadone Maintainees as Compared to Persons with Disabilities Affecting Performance as a Violation of Equal Protection

The irrationality of the TA's methadone policy is further demonstrated by the contrast with its policies respecting such groups as alcoholics, diabetics, and epileptics. See pp. 17-19 supra. The fact that an alcoholic will ordinarily be permitted to remain in service, and will be transferred if appropriate to a non-sensitive job, belies any argument that the TA lacks the ability to screen employees with disabilities, to place them in appropriate job positions or to adequately supervise and monitor their performance. Moreover, active alcoholism is obviously disabling whereas the evidence here demonstrated that methadone maintenance is not.

Even assuming arguendo, contrary to the district court's finding, that methadone maintainees are in some way disabled, the TA's policy would still be unlawful, since an employer cannot subject one type of alleged employee disability to uniquely harsh treatment. In Crawford v. Cushman, 531 F.2d 1114 (2d Cir. 1976), this Court struck down a Marine Corps disability regulation because it allowed virtually all temporarily disabled marines to remain in the Corps except for pregnant women. The Court held that discharges under the regulation violated the equal protection clause because one class of disabled persons was irrationally singled out for different treatment from all the rest:

[T]he mandatory discharge rule here is simply not constitutionally tailored to promote [general mobility and readiness] by ridding the Corps of all members whose physical condition makes them potentially unable to respondThe regulation as a tool for insuring mobility and readiness is applied in a manifestly underinclusive fashion.... The Marine Corps left all other temporary disabilities, which undeniably undermined the ability of all personnel to respond like quicksilver to duty's call, free from the mandatory discharge

"solution." ... Why the Marine Corps should choose, by means of the mandatory discharge of pregnant Marines, to insure its goals of mobility and readiness, but not to do so regarding other disabilities equally destructive of its goals, is subject to no rational explanation.

531 F.2d at 1122-23.^{37/}

C. The Irrebuttable Presumption Embodied in the Policy as a Violation of Due Process

The TA's policy also creates a permanent irrebuttable presumption that a person who receives methadone maintenance treatment is forever unemployable, even in some of the least skilled, lowest level jobs that exist in our society. The evidence demonstrated that this presumption was totally invalid, that substantial numbers of methadone maintainees were fully suitable for any form of employment and, finally, that an employer like the TA was not only fully capable of determining which methadone maintainees were employable but could actually know far more about the suitability of such persons than of virtually any other applicant or employee.

A long line of Supreme Court and other cases has held permanent irrebuttable presumptions comparable to the one created by the TA's policy to be invalid under the due process clause, and has required instead that crucial determinations be made

^{37/} See also Green v. Waterford Board of Education, 473 F.2d 629, 634-35 (2d Cir. 1973) ("Why the Board should choose, by means of an inflexible rule, to manifest particular concern with the health of a pregnant woman, but not, for example, with the health of a teacher (male or female) recuperating from a heart attack is nowhere explained.").

on an individual basis. E.g., Turner v. Department of Employment Security, 423 U.S. 44, (1975); Cleveland Board of Education v. LaFleur, 414 U.S. 632, 644-48 (1974); Vlandis v. Kline, 412 U.S. 441, 445-54 (1973); United States Department of Agriculture v. Murry, 413 U.S. 508 (1973); Stanley v. Illinois, 405 U.S. 645 (1972); Crawford v. Cushman, 531 F.2d 1114, 1124-25 (2d Cir. 1976); Berger v. Board of Psychologist Examiners, 521 F.2d 1056 (D.C. Cir. 1975). 38/

For example, in the LaFleur case, the court struck down mandatory leave provisions for pregnant teachers noting that

The mandatory termination...rules surely operate to insulate the classroom from the presence of potentially incapacitated pregnant teachers. But the question is whether the rules sweep too broadly....That question must be answered in the affirmative, for the provisions amount to a con-

38/ Recent decisions resolve any doubt as to the Court's continued reliance on the irrebuttable presumption doctrine following its decision in Weinberger v. Salfi, 422 U.S. 749 (1975), cited by defendants on this appeal. First, in Turner v. Dept. of Employment Sec., *supra*, a post-Salfi case, the Court again invoked the irrebuttable presumption doctrine, holding that the State of Utah could not establish arbitrary pre- and post-natal periods during which women would be barred from receiving unemployment benefits. Salfi was a case involving access to monetary benefits under the Social Security Act, and its applicability hence is quite limited given that in the area of social welfare the legislature has been held to possess broad discretion to maximize use of available funds and resources. In a very recent case Justice Rehnquist, who wrote the majority opinion in Salfi, made clear that the Court indeed viewed Salfi with this limitation in mind. See Califano v. Goldfarb, 45 U.S.L.W. 4237, 4244 (March 2, 1977). See also Miller v. Carter, ___ F.2d ___ (7th Cir. No. 75-1162, Jan. 4, 1977), slip op. at 25-27 (Campbell, J. concurring).

clusive presumption that every pregnant teacher who reaches the fifth or sixth month of pregnancy is physically incapable of continuing. There is no individualized determination... as to any particular teacher's ability to continue at her job. The rules contain an irrebuttable presumption of physical incompetency, and that presumption applies even when the medical evidence as to an individual woman's physical status might be wholly to the contrary.

414 U.S. at 644-45. Similarly in Vlandis v. Kline, 412 U.S. 441, 446, 452 (1973), the Court held:

[I]t is forbidden by the Due Process Clause to deny an individual [a benefit] on the basis of a permanent and irrebuttable presumption...when that presumption is not necessarily or universally true in fact, and when the State has reasonable alternative means of making the crucial determination.^{39/}

Thus, the mere fact that some methadone maintenance program participants might be bad employment risks cannot justify an absolute rule prohibiting the employment of the entire class. Members of that class have a fourteenth amendment right to have their employment capabilities considered on an individual basis.

^{39/} Cf. Thompson v. Gallagher, 489 F.2d 443, 449 (5th Cir. 1973).

II

THE DISTRICT COURT WAS CORRECT IN HOLDING
THAT THE TRANSIT AUTHORITY'S POLICY VIOLATED
TITLE VII OF THE 1964 CIVIL RIGHTS ACT IN THAT
IT HAD A RACIALLY DISCRIMINATORY IMPACT
AND WAS UNRELATED TO ANY BUSINESS NECESSITY

As described supra p. 8 the district court initially ruled for plaintiffs on constitutional grounds and found it unnecessary to reach their claim under Title VII of the 1964 Civil Rights Act. The court's subsequent decision on the Title VII claim was made solely for purposes of determining plaintiffs' right to costs and attorneys' fees. See 414 F.Supp. at 278, App. 398a. After the court's Title VII decision, Congress enacted the 1976 Civil Rights Attorneys Fee Award Act (42 U.S.C. §1988), which established plaintiffs' right to the award of fees on their constitutional claim, and the court ruled that the TA was liable for fees under the new Act as well as under Title VII. See p. 55 infra; App. 508a. Accordingly, since the original reason requiring the district court to reach the Title VII claim no longer exists, this Court need not consider that claim if it affirms on constitutional grounds. However, as set forth below, the district court's decision on the Title VII claim was clearly correct.

* * * *

There can be no doubt that the TA's drug policy constitutes a form of racial discrimination that goes beyond a mere technical showing of racial impact. The TA's methadone policy is in fact part of a broader policy banning the employment of all persons with any history of drug abuse. p. 11 supra. And the unfortunate fact is that drugs have long been inextricably linked to minority ghetto life. Eighty percent of all active heroin addicts are black or Hispanic. App. 840a. The named plaintiffs and class member Wright are all either black or Hispanic. Beazer, who grew up in Harlem, and Reyes, who grew up in a poor Spanish section of Queens, both testified that their initial involvement

with heroin started during adolescence and was a natural part of their neighborhood setting. App. 591a; 668a. Dr. Dole testified that the prototype addict is someone who is

black or Puerto Rican, who is brought up in a disadvantaged neighborhood... where an enormous exposure to narcotic drugs occurred when he was in adolescence... In some ways, if you are a kid in that cultural group in that neighborhood and you haven't ever tried narcotics, you are out of it. You are a deviant.

App. 1563a.

The contrast between the TA's enlightened policy towards alcoholism — a problem with which middle-class whites are all too familiar — and its attitude towards drug addiction — a problem primarily associated with minority ghetto dwellers — demonstrates the inherently racial nature of its drug policy.

These are among the considerations that have led commentators to conclude Title VII prohibits discrimination against methadone participants:

[D]iscrimination against ex-addicts is more than merely statistically related to racial discrimination. While courts tend to deal purely in terms of numerical percentages, there is a link between addiction and other problems more readily associated with past racial discrimination. The concentration of heroin users in the poverty-stricken slum areas of major cities provides one indication of this connection. A high rate of addiction may thus be seen as a product of past racial discrimination....

Note, Employment Discrimination Against Rehabilitated Addicts, 49 N.Y.U.L.Rev. 67, 72 (1974).

A. The Title VII Standard

An employment criterion which operates to exclude a disproportionate percentage of minority group members violates Title VII unless the employer can establish that it is required by business necessity. Griggs v. Duke Power Co., 401 U.S. 424 (1971). This standard demands that an employer come forward with a much more rigorous justification than it would have to under the "rational relationship" test applied in a constitutional

context.^{40/} Moreover, Title VII requires no showing of discriminatory intent.^{41/}

The TA's reliance on Washington v. Davis, 426 U.S. 229 (1976), is misplaced. In Davis the Court rejected a constitutional challenge to employee selection practices on the ground that proof of a racially discriminatory purpose had not been established, and that in the absence of such proof the strict scrutiny equal protection test was inapplicable. However, the Court simultaneously recognized that in Title VII cases proof of discriminatory intent is not necessary, and the most stringent review of an employer's practices is required.^{42/}

The TA's assertion (brief p. 23) that in the past it has not practiced overt discrimination and has in fact hired large numbers of minority employees is an irrelevant

^{40/} "Business necessity" as it has been defined by this Court and other circuits is not satisfied even by a showing that the practice in question serves a legitimate management function. United States v. Bethlehem Steel Corp., 446 F.2d 652, 662 (2d Cir. 1971) ("Necessity connotes an irresistible demand. To be preserved, the seniority and transfer system must not only directly foster safety and efficiency of a plant, but also be essential to those goals....If the legitimate ends of safety and efficiency can be served by a reasonably available alternative system with less discriminatory effects, then the present policies may not be continued). See also Rock v. Norfolk & Western Ry. Co., 473 F.2d 1344, 1349 (4th Cir.), cert. denied, 412 U.S. 933 (1973); U.S. v. Chesapeake & Ohio Ry. Co., 471 F.2d 582, 588 (4th Cir. 1972), cert. denied, 411 U.S. 939 (1973); U.S. v. St. Louis-San Francisco Ry. Co., 464 F.2d 301, 308 (8th Cir.), cert. denied, 409 U.S. 1116 (1972); Robinson v. Lorillard Corp., 444 F.2d 791, 798 and n. 7 (4th Cir. 1971), cert. denied, 404 U.S. 1006 (1971).

^{41/} Griggs, supra, 401 U.S. at 432. See also Gregory v. Litton Systems, Inc., 316 F.Supp. 401, 403 (C.D. Cal. 1970), aff'd 472 F.2d 631 (9th Cir. 1972); Johnson v. Pike Corp., 332 F.Supp. 490, 493-94; (C.D. Cal. 1971); Robinson v. Lorillard Corp., 444 F.2d 791, 796-97 (4th Cir. 1971).

^{42/} "Under Title VII, Congress provided that when hiring and promotion practices disqualifying substantially disproportionate numbers of blacks are challenged, discriminatory purpose need not be proved, and that it is an insufficient response to demonstrate some rational basis for the challenged practices." 426 U.S. at 246.

A number of cases since Washington v. Davis have explicitly noted the continuing validity of the Griggs Title VII test. See, e.g., General Electric Co. v. Gilbert, ___ U.S. ___, 97 S.Ct. 401, 413-21 (1976) (opinions of Justices Stewart, Blackmun, Brennan and Marshall, and Stevens); Davis v. Passman, 544 F.2d 865, 869 (5th Cir. 1977); Gibson v. Local 40, Supercargoes and Checkers, 543 F.2d 1259, 1265 (9th Cir. 1976); Harrington v. Vandalia-Butler Bd. of Educ., 418 F.Supp. 603, 607 (S.D. Ohio 1976).

The TA's reference to the Supreme Court's granting of certiorari in United States v. Hazlewood School District, 534 F.2d 805 (8th Cir. 1976), cert. granted, 97 S.Ct. 730 (1977), is inapposite. The question of whether Congress had authority under Section 5 of the fourteenth amendment to prohibit racial discrimination by Title VII in the absence of proof of intent is only one of the questions presented in Hazlewood. Griggs is good law until the Supreme Court changes it, and General Electric Co. v. Gilbert, supra, makes it clear that a majority of the Court has no intention of doing so.

argument which has been flatly rejected in other comparable Title VII cases. For example, in Wallace v. Debron Corp., 494 F.2d 674 (8th Cir. 1974), the defendant had argued that under Griggs only those facially neutral policies that had the effect of perpetuating prior overt discrimination were violative of Title VII. The court held that there was no need to prove historical discrimination:

For us to take any position other than one which requires that all employers remove all artificial, arbitrary, and unnecessary racial barriers to employment would be inconsistent with the broad purposes of Title VII; would permit many employers (those with no past history of discrimination and new employers) to erect such barriers....

494 F.2d at 676. Similarly, the 9th Circuit has held:

Historical discrimination need not be shown in order to obtain relief from discrimination in fact, regardless of its cause or motive

Gregory v. Litton Systems, 472 F.2d 631, 632 (9th Cir. 1972). And, of course, sex-based discrimination has been struck down in numerous cases brought under both the Constitution and Title VII against employers like local school districts, the vast majority of whose employees are women. E.g., Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974); Green v. Waterford Board of Education, 473 F.2d 629 (2d Cir. 1974).

B. Application of the Title VII Standard to the Instant Case

As demonstrated, the TA's methadone policy fails to satisfy the most lenient equal protection standard — the rational relationship test. Obviously the policy dramatically flunks the far stricter business necessity test. The TA not only failed to validate its policy — it failed even to think about it. Pp.12-13 supra.

The district court's finding that the TA's policy has "a substantially greater impact on minority groups than on whites" (414 F.Supp. at 279, App. 399a) is supported by the uncontested evidence.

The racial/ethnic composition of metropolitan New York City is approximately

75% white, 16% black, and 7% Hispanic.^{43/} The parties stipulated that the TA draws its employees from the metropolitan New York City civilian workforce, and that census data for the racial/ethnic breakdown of that group are essentially identical. (App. 232-33a; 248a). By contrast, the methadone maintenance population for metropolitan New York City is overwhelmingly minority, consisting of 39% blacks, 23% Hispanics and only 33% whites. App. 588a, 233a, 248a. A physician retained by the TA to assist in applying its drug policy testified that of the persons referred to him 72% were black, 9% Hispanic, and only 10% white.^{44/}

In sum, almost two-thirds of the plaintiff class was comprised of minority group members as compared to a general population with less than one quarter minority group members. Thus, a black person is approximately five and one-half times more likely than a white person to be a participant in a methadone maintenance program. For an

^{43/} App. 232a-33a, 248a. All of the census figures were derived directly from U.S. Bureau of the Census, Census of Population: 1970, Vol. 1, CHARACTERISTICS OF THE POPULATION, Part 34, New York, Section 1a Tables 23, 96; U.S. Bureau of the Census, Census of Population: 1970, SUBJECT REPORTS, Final Report PC(2)-1E, Puerto Ricans in the United States, Table 1.

^{44/} App. 587a; 232a; 248a. The reason that there are no further data in the record regarding the precise racial breakdown of persons actually dismissed from or rejected for TA employment due to the methadone policy is that the TA refused to make discovery on this issue and the court denied plaintiffs' motion to compel such discovery. See Plaintiffs' Interrogatories and Request for Production addressed to TA defendants (June 22, 1973) Nos. 52-53; TA Defendants' Answers (October 23, 1973) Nos. 52-53; Plaintiffs' Affidavit in Support of Motion for Sanctions for Failure to Make Discovery, Oct. 18, 1973.

It is clear, however, that the overall population statistics cited above amply support the court's finding of adverse racial impact under Title VII. As demonstrated *infra*, it is precisely such statistics that have been relied upon to establish unlawful racial discrimination in numerous cases directly comparable to the instant action.

Moreover where, as here, a publicly admitted and announced blanket policy is at issue, statistics relating to the general workforce population and to the population subject to the policy are clearly more relevant than any other statistics, since most rational methadone patients would simply not have applied for a job from which they knew they would be excluded, no matter how eligible and how anxious for such employment.

Hispanic person, the likelihood as compared to a white person is approximately seven and one-half times.^{45/}

In a number of cases courts have relied on a statistical showing of racial impact directly comparable to that made out here to hold that employment policies excluding persons on the basis of criteria such as arrests, convictions, garnishment, and illegitimate children were violative of Title VII. See e.g., Green v. Missouri Pacific Railroad Co., 523 F. 2d 1290, 1294-95 (8th Cir. 1975) (since blacks were 2 to 6 times more likely than whites to have conviction records employer's policy of refusing to hire any person with a criminal conviction violative of Title VII); Gregory v. Litton Systems Inc., 316 F.Supp. 401, 403 (C.D. Cal. 1970), aff'd 472 F. 2d 631 (9th Cir. 1972) (employer's use of arrest records violative of Title VII since blacks nationally comprise 11% of the population, and account for 27% of reported arrests);^{46/} Wallace v. Debron Corp., 404 F.2d 674 (8th Cir. 1974) and Johnson v. Pike Corp., 332 F.Supp. 490, 494 (C.D. Cal. 1971) (discharge of employees whose wages have been frequently garnished violative of Title VII since a greater

^{45/} The measures of likelihood are derived as follows:

$$\frac{\text{ratio of minority group to whites in methadone treatment}}{\text{ratio of minority group to whites in general population}} = \text{"Index of over-representation"}$$

Thus, using the data in evidence:

$$\frac{\frac{39\%}{33\%}}{\frac{16\%}{75\%}} = 5.6\% \text{ (Blacks)} \quad \frac{\frac{23\%}{33\%}}{\frac{7\%}{75\%}} = 7.5\% \text{ (Hispanics)}$$

See Loether & McTavish, Descriptive Statistics for Sociologists 195 (1974) (concept of deviation from expected result as tested by the chi-square method).

^{46/} See also Carter v. Gallagher, 3 Empl. Prac. Dec. (CCH) ¶8205 (D. Minn. 1971), 452 F. 2d 315 (8th Cir. 1971), (en banc), cert. denied, 406 U. S. 950 (1972) ("Comparison of the census data with the arrest data reveals that there is and has been a substantial and significant disparity between the percentage of non-white persons in the city and the percentage of non-white persons arrested...Since the percentage of arrests was substantially higher for non-white persons in Minneapolis, the purported arrest record qualification would have had a decided discriminatory effect in discouraging non-white persons from applying for the fire fighter position..." 3 Empl. Prac. Dec. (CCH) at 6670).

proportion of racial minorities among the group of people who have had their wages garnisheed significantly higher than proportion of minorities in the general population).^{47/}

The TA's argument (brief p. 22) regarding the number of minority group members affected by its policy is also without merit. In none of the garnishment or illegitimate children cases was there any showing that the employment criterion at issue affected a large percentage of the entire minority population. The relevant statistical determination is rather the percent of persons affected by the criterion who are members of minority groups. The Eighth Circuit adjudicated this precise issue in Green v. Missouri Pacific R. Co., 532 F. 2d 1290 (8th Cir. 1975). The district court had concluded that because only 2.05% of an employer's job applicants were black persons who were rejected due to conviction records, the employer's policy of not hiring persons with conviction records had only a de minimus discriminatory effect not cognizable under Title VII. On appeal the Court of Appeals found that by focusing on class size the district court had made a fundamental error:

[C]omparing the resulting percentage of 2.05 against the percent of blacks in the relevant population area is of no assistance... The issue to be examined statistically is whether the questioned employment practice operates in a disparate manner upon a minority race or group, not whether the individuals actually suffering from a discriminatory practice are statistically large in number. [emphasis added]

523 F. 2d at 1295. The Eighth Circuit's opinion makes perfect sense. The TA could not

^{47/} The same principle has been applied in innumerable EEOC decisions to forbid the use of various non-job-related employment criteria when general population statistics reveal that minority groups are disproportionately subject to these criteria. See, e.g., EEOC Dec. No. 71-332, EEOC Dec. (CCH) ¶ 6164 (September 28, 1970) (unwed mothers); EEOC Dec. No. 72-0284, EEOC Dec. (CCH) ¶ 6304 (August 9, 1971) and EEOC Dec. 71-1529, EEOC Dec. (CCH) ¶ 6231 (April 2, 1971) (minimum height restrictions). Vast numbers of these decisions have struck down the use of non-job-related arrest and conviction records on the rationale of Greene, Gregory and Carter, supra. See, e.g. EEOC Decisions reported at Emp. Prac. Guide (CCH) ¶¶ 6424; 6423; 6418; 6414; 6408; 6400; 6386; 6352; 6341; 6350; 6333; 6357; 6312; 6295; 6288; 6253; 6274.

argue, for example, that an employer in Salt Lake City which has few blacks could therefore maintain a policy of refusing to hire blacks. Moreover, given that there are 40,000 methadone maintenance participants in the New York City area (p. 21 supra), the impact of the TA's policy is far from de minimus.^{48/}

^{48/} The TA's claim that a student authored note appearing at 49 N.Y.U.L. Rev. 67 (1974) supports its position is ill-founded and achieved in part by omitting relevant portions of a quotation. Thus the TA says that the authors of the note "... wrote that Title VII must be stretched 'to reach the apparently neutral policy of barring ex-addicts from jobs on the ground that such a policy constitutes de facto discrimination.'..." (brief at 25). The TA omits, however, the next sentence which reads, "Griggs, however, apparently permits this extension." Although expressing some reservations about applying Title VII to ex-addict discrimination, the note addresses many of the cases discussed herein and concludes that "The emphatic language and reasonably clear implication of the above cases seem naturally to extend to the argument for applying Title VII to employment discrimination against ex-addicts." 49 N.Y.U.L. Rev. at 72; see also p.⁴⁶ supra. For another treatment of some of the same issues involved in this case see Note, Methadone Maintenance Program Participation as a Hiring Criterion, 5 Colum. Human Rights L. Rev. 420 (1973). Both this and the NYU articles refer to this case and agree that the TA's policy is irrational and racially discriminatory.

III

THE DISTRICTS COURT'S RULING THAT PLAINTIFFS FRASIER AND DIAZ
ARE ENTITLED TO SPECIFIC RELIEF MUST BE AFFIRMED

The facts demonstrating that plaintiffs Malcolm Frasier and Francisco Diaz have succeeded through methadone treatment in rehabilitating themselves and were fully suited for the jobs of bus cleaner and maintainer's helper are summarized at pp. 32-34 supra.^{49/}

As representative plaintiffs in this action, these men were subjected to extraordinarily intense scrutiny. They gave extensive testimony; submitted to psychomotor and intelligence tests; were medically examined by the TA; and had their methadone records and the persons who made them examined. E.g., App. 239-429a, 633-62a; 849-64a; 2090-92a; 2105; 2112-13a; 2122-25a; 2137; 2138-50a 2271-90a; 2385a; 2765a; 2767a. At the conclusion of all this, and after having considered all the claims reasserted on this appeal by the TA, the court found that there was no valid ground for their rejection from employment.

In reaching its conclusion the court determined that all the claims the TA had attempted to dredge up about the plaintiffs were asserted in "bad faith". Thus as to plaintiff Frasier, the court found:

The Transit Authority's reasoning in now excluding Frasier from employment is precisely what I held to be unreasonable and unconstitutional in my August 5, 1975 opinion. There is no indication that Frasier lacks the physical or mental capability of being a car cleaner. There is not the slightest indication of a lack of proper work habits. There is no indication of any illicit drug use or even methadone use for a period of years.

... In my view Frasier is precisely the kind of an individual clearly covered by my ruling of August 1975 and I find no rational reason for excluding Frasier from employment as a car cleaner and no indication of any realistic disability on the part of Frasier for that position.

App. 496-97a.

^{49/} Paragraphs 4-5 of the Amended Permanent Injunction and Judgment provided that these plaintiffs were to be hired in these positions "as soon as an appropriate position becomes available". At a hearing held January 21, 1977, the district court declined to stay this portion of the judgment. Tr. 54-55. The TA subsequently sought such a stay from this Court, which on March 15, 1977, after oral argument, denied it on the merits.

Similarly, as to plaintiff Diaz the court found:

This is another case like the case of Frasier where we have clear evidence of a man who has licked the heroin habit and has indeed successfully gone through a methadone program and completed it. . . .

I can only conclude that the statement about Diaz' not complying with the Transit Authority's general standards is not made in good faith. There is no evidence whatever that Diaz lacks the incentive to work, lacks work habits, lacks the work skills required...

App 500a.

The district court's rulings with respect to Frasier and Diaz were clearly correct.^{50/}

^{50/} The TA is flat wrong in its assertion (brief p. 19) that the court's decision to fix the date from which back pay would accrue at January 1, 1973 somehow justifies its rejection of plaintiff Diaz in 1970. Methadone maintenance treatment was well established in 1970. (App. 443-44a). The decision of the district court was simply an exercise of its discretion in determining the amount of back pay once it had found liability for such an award. The court made clear its intention was simply to impose some limit on the TA's liability for back pay to the plaintiff class. Diaz was clearly unlawfully denied employment when he first applied to the TA, and on a continuing basis thereafter by virtue of the TA's methadone policy.

The TA's complaint that the court should have allowed it to use the "one-out-of-three rule" as a basis for rejecting these plaintiffs is ludicrous. The TA's arguments regarding their power to reject these plaintiffs under that rule had already been advanced by the TA and rejected by the court below as evidence of their bad faith determination to avoid the impact of the court's constitutional ruling. App. 505a; 399 F. Supp. at 1052, App. 385a.

IV

THIS COURT MUST AFFIRM THE DISTRICT COURT'S
AWARD OF COSTS AND ATTORNEYS' FEES

The district court awarded plaintiffs costs of \$14,290 plus an attorney's fee of \$360,710 for a total award of \$375,000. There can be no doubt that the court's decision to award costs and fees, based on both Title VII of the 1964 Civil Rights Act and the 1976 Civil Rights Attorneys' Fee Award Act was correct.^{51/} Moreover, given the complex nature of the case, the thousands of hours expended, and the important policy considerations involved, clearly the amount of costs and fees awarded was a most reasonable exercise of discretion.

A. Liability for Costs and Fees

Plaintiffs have a clear-cut right to costs and fees on their constitutional claims brought pursuant to 42 U.S.C. §1983. The Civil Rights Attorneys' Fee Award Act of 1976, 42 U.S.C. §1988, provides that

In any action or proceeding to enforce a provision of sections 1981 to 1983, 1985, and 1986 of this title...the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

^{51/} The TA's denial at p. 26 of its brief that the district court ruled on plaintiffs' motion for costs and fees pursuant to the 1976 Act is puzzling. The record plainly demonstrates that the court did so rule. Thus, at a hearing held pursuant to plaintiffs' motion for a declaration of liability under the 1976 Act, the court ruled:

It is clear from the authorities that plaintiffs' counsel are entitled to an award covering fees and disbursements. They are entitled to this both with respect to the recovery they have won under Section 1983 and under Title VII.

Without going into detail, they are entitled to such an award under the 1976 statute and also under the other applicable cases and statutes. All of these have been briefed thoroughly and I won't attempt to lay them out here. The matter, in my view, is obvious.

App. 508.

In any event, plaintiffs would plainly be entitled to the award of costs and fees under the 1976 Act even if the district court had not ruled. The Act's legislative history states that it is intended to apply to all cases pending on the date of enactment. H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. (1976) at 4, n.6. And this Court must, of course, decide this case in accordance with the law as it exists at the time of its own decision. Bradley v. School Board of Richmond, 416 U.S. 696 (1974).

The language is identical to that contained in Title VII and other sections of the 1964 Civil Rights Act. And the legislative history of the 1976 Act leaves no doubt as to the standard of liability that Congress intended:

It is intended that the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act. A party seeking to enforce the rights protected by the statutes covered by [§1988], if successful, "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968).

S. Rep. No. 94-1011, 94th Cong. 2d Sess. (1976) at 4b (hereinafter referred to as "Senate Report"). Since the standards applicable under the 1964 and the 1976 statutes are essentially the same, this Court need never reach plaintiffs' Title VII claim if it affirms the district court's decision on the merits of plaintiffs' constitutional claim.

A substantial and consistent body of case law interpreting the "discretionary" award of counsel fees under the 1964 Civil Rights Act has converted the rather neutral language contained in that and the 1976 Act permitting fee awards into a presumption of an award to a successful plaintiff, holding that the award should always be made absent exceptional circumstances. The leading case is Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968), referred to in the legislative history of the 1976 Act as setting the applicable standard. The Court made clear in Newman that little discretion is left to a court in awarding counsel fees to a prevailing plaintiff:

If [a plaintiff] obtains an injunction, he does so not for himself alone but also as a "private attorney general," vindicating a policy that Congress considered of the highest priority. If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts.

It follows that one who succeeds in obtaining an injunction under that title should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.

390 U.S. at 402. (Emphasis added).^{52/}

^{52/} The Newman standard has been scrupulously followed in cases brought under Title VII as well as other titles of the 1964 Civil Rights Act and similar statutes involving the identical discretionary language. See, e.g., Northcross v. Board of Education, 412 U.S. 427 (1973) (Emergency School Aid Act of 1972); Lea v. Cone Mills Corp., 438 F.2d 86, 88 (4th Cir. 1971) (Title VII).

Extensive research has revealed no case in which fees were denied on "special circumstances" grounds. Certainly none exist in this case.

B. The Amount of Costs and Fees

The court's determination of the amount of the award was reached after submission of extensive documentation and a hearing in accordance with the requirements of City of Detroit v. Grinnell, 495 F. 2d 448, 468 (2d Cir. 1974). App. 408-37a; 468-80a. Virtually the entire fee was based on an hourly rate applied to the actual time expended by plaintiffs' attorneys. Taking into account all the circumstances presented by the TA, including those raised on this appeal, the court denied plaintiffs' request for a substantial premium and held:

I believe under all the circumstances, and I will not try to enumerate all of them, but I believe that the premium should be modest.

App. 511a.^{53/} Accordingly, the court granted plaintiffs a total of \$375,000 in place of the \$645,000 they had requested.

Plaintiffs submitted a detailed accounting of the time spent and work performed by each of the attorneys (App. 408-26a) information concerning their backgrounds and qualifications (App. 410-414a; 427-37a) and evidence concerning the prevailing billing rates for comparable litigation charged by attorneys of like credentials and experience in New York City. App. 438-42a. The TA was given full opportunity to present testimony and cross-examine or question in any way plaintiffs' lawyers about the facts concerning their work in the case. App. 468a.

The TA's arguments were all raised below and taken into account where appropriate in setting the total award. They relate to issues within the district court's discretion which, as demonstrated infra, was exercised in accordance with well-established law.

^{53/} Thus the court awarded a premium of only approximately \$50,000. (The court had calculated a "basic fee" of \$310,000 based on the time charges, fixed a "total fee" of \$375,000, and directed plaintiffs to take their disbursements out of that fee. App. 511a-12a). As set forth infra, p. 60, this premium was indeed modest given the considerations for such awards established by this court, and the magnitude of premiums in other cases.

The TA's first argument is that the hours expended by plaintiffs' attorneys on the case were somehow excessive. Obviously the district court was in the best position to judge this, and it flatly rejected the TA's contention:

No serious challenge has been made to the presentation of evidence about the amount of time spent by plaintiffs' attorneys in this litigation.

The only exception is a rather vague suggestion that perhaps the preparation was somewhat exaggerated in connection with the amount of work required and also the suggestion that perhaps there was duplicate staffing.

I am not prepared to so criticize the efforts of plaintiffs' attorneys. This was a difficult case. It required a great deal of factual and legal research and technological research for its proper presentation.

It would be difficult to say that plaintiffs' lawyers should have done it some other way or some cheaper way.

App. 509-10a.^{54/}

Defendants also argue that plaintiffs' attorneys should not have been awarded fees at the rates set because they are not involved in "commercial litigation" "for economic gain." The court specifically found that the rates it set were: "really conservative considering the talent displayed and what I believe is the rate charged by other experienced lawyers in this city." App. 510a. Moreover, it was clearly proper for the lower court to look to rates charged by comparable attorneys in New York City for other types of complex federal litigation. A long line of civil rights cases holds that the measure of fees should be "the going rates for similar services received by privately employed counsel for work of comparable importance, extent and complexity." Torres v. Sachs, 538 F. 2d 10, 11 (2d Cir. 1976).^{55/} And the legislative history of the 1976 Act makes clear that Congress intended this standard to be applied in all civil rights cases:

It is intended that the amount of fees awarded under [the 1976 Act] be governed by the same standards which prevail in other types of equally

^{54/} The TA's claim that plaintiffs were represented by three attorneys at almost every pretrial activity is simply inaccurate, as was pointed out to the court below.

^{55/} Accord Tillman v. Wheaton-Haven Recreation Ass'n., Inc., 517 F.2d 1141 (4th Cir. 1975); Fairley v. Patterson, 493 F.2d 598 (5th Cir. 1974); Davis v. County of Los Angeles, 8 CCH Empl. Prac. Dec. ¶ 9444 (C.D. Cal. 1974); Miller v. Amusement Enterprises, Inc., 426 F.2d 534, 539 (5th Cir. 1970).

complex Federal litigation, such as antitrust cases and not be reduced because the rights involved may be nonpecuniary in nature.

Senate Report at 6b.^{56/}

Similarly, the TA's contention that the fact that plaintiffs are employed by a public interest law firm with outside funding should result in a lower fee was also raised below, considered at length (App. 468-74a), and taken into account in setting the fee. While this factor undoubtedly influenced the court to err on the side of conservatism, its decision to not substantially discount the fee on this ground was clearly proper. Thus in Torres v. Sachs, 538 F.2d 10, 11 (2d Cir. 1976), this Court held it was proper to award fees to attorneys working for civil rights organizations with outside funding at the same rate as for privately employed counsel of comparable experience and skill. The Torres standard was favorably cited in the legislative history of the 1976 Act. H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. (1976) at 8 n.16. (Hereinafter referred to as "House Report".)

The TA's final contention, that its financial problems should operate to reduce the fee award, was also explicitly taken into account by the district court. (App. 471a; 511a.) In fact, the court may even have been unduly deferential to defendants' financial condition given the clear state of the law that in civil rights cases

the fees are to be measured by the same standards as in other complex federal litigation and are intended to be collectible from offending municipal officials and bodies. (emphasis added)

Torres v. Sachs, 538 F.2d 10, 12-13 (2d Cir. 1976). Indeed, the legislative history of the 1976 Act makes clear Congress' view that it is particularly appropriate for public defendants to pay attorneys' fees because the burden can ultimately be spread through taxes:

^{56/} The fee set by Judge Griesa in this case is clearly well within the range of fees set in a number of recent cases in this Circuit. See, e.g., City of Detroit v. Grinnell, 68 Civ. 4026 (S.D.N.Y. April 21, 1976) (on remand) (\$125 per hour); Gilman v. Mohawk Data Sciences, 71 Civ. 4742 (S.D.N.Y. May 3, 1976) (\$60 per hour for attorneys 2 to 5 years out of law school); Blank v. Talley Industries, Inc. 390 F.Supp. 1 (S.D.N.Y. 1975) (\$50-\$100 per hour); Quirke v. Chessie Corp., 368 F.Supp. 558 (S.D.N.Y. 1974) (\$150 per hour). Moreover, in many of these cases, the figures set forth above were base rates to which a substantial multiple or "incentive award" was added. E.g., Grinnell (multiplier of 3); Mohawk Data Sciences (multiplier of 3); Blank (50% incentive award); Quirke (50% incentive award); Gold v. D.C.L., Inc., 72 Civ. 4193 (S.D.N.Y. Jan. 22, 1975) (50% incentive award).

Governmental officials are frequently the defendants in [these] casesSuch governmental entities and officials have substantial resources available to them through funds in the common treasury, including the taxes paid by the plaintiffs themselves....The greater resources available to governments provide an ample base from which fees can be awarded to the prevailing plaintiffs in suits against governmental officials or entities.^{57/}

The court's award of a modest premium was clearly proper under the factors for such awards set out in City of Detroit v. Grinnell, 495 F.2d 448, 470 (2d Cir. 1974), and was indeed modest as compared to incentive awards given in other cases.^{58/} Thus the case was novel in that it raised for the first time in a judicial setting fundamental factual issues about the employability of persons participating in methadone programs. Plaintiffs brought together the leading experts in the country on the subject and elicited complex medical and scientific evidence. The case was prolonged by defendants' refusal to consider altering their patently unreasonable policy, even when urged to do so by the court.

^{57/} House Report at 7. See also Oliver v. Kalamazoo Board of Education, F. Supp. No. K88-71 (S.D. Mich. Nov. 5, 1976), where the court took defendants' financial problems into account only to limit the multiplier to a factor of 2.

In any event, defendants' argument that the TA might "have to resort to a fare increase or take other drastic measures" to meet plaintiffs' fee request is absurd. The TA has an annual budget of well over one billion dollars, and given the essential nature of the services which it provides, its future existence is virtually guaranteed. Thus in 1975 the TA received approximately 301 million dollars in federal, state, and city subsidies. And another 700 million dollars was raised through fare collections. N. Y. Times, December 7, 1976 p.1, col. 1.

Indeed in the district court proceedings, the defendants' lawyer himself minimized the impact of the fee given the magnitude of the TA's overall budget. TR. Jan. 21, 1977 at 56-58.

^{58/} See e.g., City of Detroit v. Grinnell, 68 Civ. 4026 (S.D.N.Y. April 21, 1976) (on remand) (multiplier of 3); Blank v. Talley Industries, 390 F.Supp 1 (S.D.N.Y. 1975) (50% incentive award); Gilan v. Mohawk Data Sciences, 71 Civ. 4742 (S.D.N.Y. May 3, 1976) (multiplier of 3); Pealo v. Farmers Home Administration, 412 F.Supp 561 (D. D.C. 1976) (50% incentive award); Oliver v. Kalamazoo Board of Education, F.Supp. No. K88-71 (S.D. Mich. Nov. 5, 1976) (multiplier of 2); Gold v. D.C.L., Inc., 72 Civ. 4193 (S.D.N.Y. Jan. 22, 1975) (approximately 50% additional award); Doughboy Industries, Inc. v. American Cyanamid Co., 1975-2 Trade Cas. (CCH) ¶ 60, 452 (D.Minn. 1975) (multiplier of 3); National Ass'n of Regional Medical Programs, Inc. v. Weinberger, 396 F.Supp. 842 (D. D.C. 1975) (88% incentive award); Quirke v. Chessie Corp., 368 F.Supp. 558 (S.D.N.Y. 1974) (47% additional award); Lindy Bros. Builders, Inc. of Philadelphia v. American Radiator & Standard Sanitation Corp., 382 F.Supp. 999 (E.D. Pa. 1974) (100% additional award); Arenson v. Board of Trade of Chicago, 372 F.Supp. 1349 (N.D. Ill. 1974) (multiplier of 4); In re Gypsum Cases, 386 F.Supp. 959 (N.D. Cal. 1974) (multiplier of 3); National Council of Community Mental Health Centers, Inc. v. Weinberger, 387 F.Supp. 991 (D. D.C. 1974) (30% incentive award); Williams v. Saxbe, 12 Empl. Prac. Dec. (CCH) ¶ 11130 (D. D.C. 1976) (Title VII) (35% incentive award); Parker v. Matthews, 411 F.Supp. 1059 (D. DC. 1976) (Title VII) (25% incentive award); Davis v. County of Los Angeles, 8 Empl. Prac. Dec. (CCH) ¶ 9444 (C.D. Cal. 1974) (Title VII) (13% bonus award).

Plaintiffs undertook substantial risk in the litigation of this case. Had they not prevailed the thousands of hours expended would have been totally uncompensated. Plaintiffs' attorneys undertook total responsibility for the conduct of this litigation, without the benefit of prior government actions or consent decrees. They bore extra responsibility as a result of the court's decision to call many additional witnesses on its own, whom plaintiffs agreed to locate and present. 399 F.Supp. at 1037; App. 370a.

It is also clear that the case has been of enormous public benefit. A significant sector of the local economy has been opened to a large group of persons to whom it had previously been unjustly closed. The decision has been widely praised in the media.^{59/}

Finally, the recently enacted Civil Rights Attorneys' Fee Award Act of 1976 and its accompanying legislative history leave no doubt that Congress considers the award of substantial attorneys' fees to private civil rights litigants of the highest priority.^{60/}

^{59/} See, e.g., Editorial, New York Times, August 20, 1975, p. 36.

^{60/} Favorably cited in this legislative history are decisions indicating the special importance of making substantial attorneys' fee grants in civil rights cases. See e.g., Senate Report at 3B, 6b, citing Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 401-02 (1968) ("When a plaintiff brings an action...he does so not for himself alone but also as a 'private attorney general' vindicating a policy that Congress considered of the highest priority"); Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 716 (5th Cir. 1974) (A court has a special obligation to "liberally [apply] the attorney's fees provision ... recognizing the importance of private enforcement of civil rights legislation.").

PLAINTIFFS' CROSS APPEAL

Plaintiffs rely on, and refer the Court to, the facts set forth at pp. 28-34 supra.

ISSUES FOR REVIEW

The sole issue for review is whether the court below erred in denying relief to plaintiffs Beazer, Reyes and Wright for their unlawful discharges.

INTRODUCTION

After the court's decision that plaintiffs had been denied or dismissed from employment pursuant to its unlawful methadone policy, the TA produced a multitude of "reasons" why they were allegedly unfit for employment, none of which had played any part in the TA's earlier decisions against them. The court below properly found that the TA's "reasons" were put forth in a bad faith attempt to evade its ruling striking down the TA's methadone policy. However, the court seized upon one of the reasons given by the TA for finding Beazer and Reyes unemployable--the allegation that since they had been heroin addicts prior to their entry into methadone treatment they had violated a TA rule regarding heroin use. The court developed this "reason" into a rationale for denying relief never asserted by the TA. Indeed the TA had never even accused Wright of violating the heroin rule.

STATEMENT OF THE CASE

The court's decision was based on application of the wrong legal standard. The court denied relief because it believed that violation of the TA heroin rule would be a legitimate basis for the TA to find the plaintiffs permanently unemployable even though it was clear that the TA had not rested its decision on any such ground. Given the TA's evident bad faith the only appropriate relief is to order reinstatement for Beazer,

Reyes and Wright. Beazer could, of course, be reinstated to a non-sensitive position in accordance with the TA's traditional policies respecting persons they deem to be disabled.

Beazer, Reyes and Wright were fully satisfactory TA employees both prior to and after their entry into methadone treatment. See p 28-32 supra. During their period of heroin addiction they were apparently stabilized heroin addicts fully capable of performing their TA job responsibilities. (The expert testimony at trial demonstrated that a relatively small percentage of heroin addicts are capable of essentially normal functioning. 399 F. Supp. at 1038, App. 371a.) However, they all entered methadone treatment to rid themselves of the heroin habits that had plagued them since their early years despite numerous attempts to shake them. They were all model methadone patients. While on methadone they continued to perform their TA jobs well until they were discovered to be on methadone and fired as a result. See pp. 29-32 supra.

On January 11 and 13, 1977, the court ruled that the "sole basis" for denying relief to Beazer, Reyes and Wright was their violation of TA Rule 11 (b) insofar as it prohibited heroin use. App. 406a; see also App. 488a, 490a, 505-06a. Accordingly, the court dismissed the action as to them. App. 506a.

ARGUMENT

THE COURT ERRED IN DENYING BEAZER, REYES AND WRIGHT RELIEF FOR THEIR UNLAWFUL DISCHARGES

A. Beazer, Reyes and Wright Were Discharged by Reason of the TA's Unlawful Methadone Policy, Not Any Breach of the TA Rule Regarding Heroin

But for these plaintiffs' violation of the TA's unlawful methadone policy they would never have been fired.

Beazer was suspended as soon as the TA discovered he was in methadone treatment, and the charges against him were upheld in a decision that made it clear he was fired for violation of the methadone policy and that alone. App. 2692-93a.

Reyes was discharged on the basis of a hearing that focused on his methadone treatment and the TA's methadone policy. The hearing referee made clear that the TA policy in question was that "of not permitting employees who are under methadone treatment to remain in the system." Plaintiffs' trial ex. 4 (Reyes TA hearing tr.) pp. 7, 20, 43.

Wright was dismissed when the TA learned he was in methadone treatment. At the time he was discovered he was told that he would have to leave TA employ because of the methadone policy, and he was immediately suspended pending his formal disciplinary hearing. No reference was made to Wright's prior heroin use. App. 400-02a, ¶ 4-7. No charges or findings were ever made against Wright regarding breach of the heroin rule. Moreover, the TA never even argued below that breach of the rule was a reason to find Wright unfit for employment.^{61/} Nonetheless, the court apparently decided on its own initiative that Wright's prior heroin use justified the TA's decision to fire him.

The court clearly erred in retroactively validating the plaintiff's discharges. Wright's case highlights the fact that the court applied the wrong legal standard, by creating on its own initiative a rationale for the discharges. The court did not find even with respect to Beazer and Reyes that the TA in fact relied on the breach of the heroin rule, nor could it have, given the TA's evident bad faith. See infra p.65-67. It simply seized on one of the multitude of post hoc rationalizations advanced by the TA for finding them unemployable in 1976, and used that to retroactively validate their 1971 and 1972 discharges.^{62/}

Under the principles established in SEC v. Chenery, 332 U.S. 194 (1947), the court was barred from relying on grounds other than those on which the TA relied. See also Federal Power Commission v. Texaco, Inc., 417 U.S. 380, 397 (1974). The fact that the TA later advanced in the context of litigation the ground relied on by the court

^{61/} See Wright "Specifications", April 19, 1976, charging he "used methadone" and Wright "Findings and Recommendations", Sept. 30, 1976, sustaining this methadone charge, and noting that dismissal was accordingly required under TA policy.

^{62/} The court below never implied that plaintiffs' discharges might have rested on any violation of the TA rule regarding heroin use. Instead the court held that violation of the rule was a reason warranting the TA in 1976, many years after their discharges, to conclude that they were presently unemployable. App. 488-89a.

is irrelevant, particularly since the court found that the argument was advanced simply as part of litigation strategy.^{63/} See e.g., Burlington Truck Lines v. U.S., 37 U.S. 156, 168-169 (1962) ("The courts may not accept appellate counsel's post hoc rationalizations for agency action".)

B. The TA's Argument Regarding Alleged Breach of Its Heroin Rule was Advanced in Bad Faith, as a Pretext for Evading the Court's Ruling Regarding Employment of Methadone Maintained Persons

The TA advanced a multitude of reasons for the alleged unemployability of the five plaintiffs. See TA Report, App. 310a. The court below rejected all these reasons except breach of the heroin rule, finding that they were not only without factual basis but that their advancement demonstrated the TA's bad faith. See pp. 29-34 supra; App. 500a. There is no reason to believe, and no indication that the court believed that the heroin rule "reason," alone among all those thrown together in the TA's report on employability, was advanced in good faith. Indeed, it clearly was not. The court simply decided that a permanent bar from employment for use of heroin would be constitutionally permissible, and ruled that the TA could refuse to employ the plaintiff employees without regard to its bad faith. This was improper. A reason cannot be used to deny reinstatement when it is advanced solely as a pretext for furthering an unlawful policy, even though the reason advanced is valid on its face.^{64/} Advancement of the arguably

^{63/} "You are questioning in a sense the good faith of the Transit Authority in relying on the violation of the rule as far as heroin usage. . . . I think there are questions about the good faith of the Transit Authority in dealing with these reapplications, and I think it is perfectly obvious that the Authority has literally used every conceivable argument, weak or strong, to avoid hiring these people. In some of the cases I think it has been ridiculous, but I must say to you that if it uses a lot of arguments weak or strong, lawyers do that all the time in litigations and this is still in litigation and if they have got a good argument, they have got a good argument." Jan. 13, 1977, hearing tr. 119-20.

^{64/} E.g., McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804-07 (1973); N.L.R.B. v. Dorn's Transportation Co., 405 F.2d 706, 713 (2d Cir. 1969); N.L.R.B. v. Midtown Service Co., 425 F.2d 665, 670 (2d Cir. 1970); Snyder Tank Corp. v. N.L.R.B., 428 F.2d 1348, 1350 (2d Cir. 1970); N.L.R.B. v. Great Eastern Color Lithographic Corp., 309 F.2d 352, 355 (2d Cir. 1962), cert. denied, 373 U.S. 950 (1963); N.L.R.B. v. George Roberts & Sons, Inc., 451 F.2d 941, 945 (2d Cir. 1971); N.L.R.B. v. Gladding Keystone Corp., 435 F.2d 129, 131-32 (2d Cir. 1970).

valid reason after the discharge, at the time of trial, constitutes clear evidence that it is in fact a pretext. See E.E.O.C. v. Kallir, Philips, Ross, Inc., 401 F. Supp. 66, 72 (S.D.N.Y. 1975) ("... the evidence abundantly establishes that the purported justification for defendant's discharge--plaintiff's alleged behavior at the February 1973 presentation--was sheer pretext advanced for the first time at the trial, more than two years after the event.")

Wholly apart from the court's own findings, the TA's bad faith is demonstrated by the earlier finding of its own Impartial Review Board, the body that ruled on Beazer's appeal from his discharge. That board's opinion clearly indicated that if the TA's methadone policy were changed Beazer should be entitled to reinstatement.^{65/}

The TA's bad faith in invoking breach of the heroin rule as justification for Beazer's and Reyes' unemployability is further demonstrated by the fact that breach of comparably serious rules by TA employees results in minimal if any disciplinary action. The TA's rules regarding abuse of alcohol and abuse of drugs are parallel. Rule 11(a) prohibits drinking on the job or being unfit for duty as a result of drinking as well as habitual use of alcohol; Rule 11(b) prohibits use of narcotics. App. 2798-99a. The maximum penalty for violation of the alcohol rule for a first offender is (1) a three-day suspension followed by return to the job, for a person serving in a non-safety-sensitive position, or (2) transfer to a non-safety-sensitive position for a person serving in a sensitive position. App. 389a.

Beazer, Reyes and Wright all had served well over three years with the TA, and their violation of the heroin rule was a first offense for each. Only Beazer was serving in a sensitive position. Had they been found drunk on their jobs, totally unfit to perform, they would simply have been subject to transfer (in Beazer's case) or three-day suspensions (in Reyes' and Wright's cases). The TA's 1976 decision that Beazer and Reyes were unemployable without regard to their demonstrated record of both good performance and rehabilitation

^{65/} The Board recommended that "if it is found that an employee using methadone can work in some capacity for the Authority, the Authority take whatever steps that are necessary to reemploy Carl. A. Beazer." App. 2693a.

leaves no doubt that the real reason for that decision was not the kind of rule violation rationale created for it by the court below but, rather, the TA's continuing irrational determination to preclude from employment anyone who has had any history of drug use or treatment.

The TA's radically disparate treatment of persons violating their alcohol rule as compared to persons violating their drug rule not only demonstrates its bad faith, but also constitutes a violation of equal protection. See pp. 41-42 supra.

C. The TA's Unconstitutionally Broad Rule Prohibiting Use Of All Narcotics Including Methadone Deterred Plaintiffs From Seeking Treatment To Cure Their Heroin Addiction

The TA's unlawful methadone policy was central to plaintiffs' violation of the TA's drug rule insofar as it applied to heroin. They testified that they had wanted to seek methadone treatment for their heroin addiction while in TA employ but had been deterred from doing so for fear that their methadone treatment would be discovered by the TA and they would be fired. App.618-19; 2377-78a; 2379-80a.^{66/} They had, while employed by the TA, tried other methods of curing their addiction but without success. App. 61718a; 2379a. But for the TA methadone rule they would have sought treatment for their heroin addiction years earlier.

Plaintiffs' cases are not unique -- they are typical. The TA policy operates as a clear deterrent to any heroin addict seeking treatment since treatment would make discovery significantly more likely. See n.66 supra. Plaintiffs' cases demonstrate the dangers inherent in the court's ruling. The testimony showed that the TA, like most major employers, has large numbers of heroin addicts in its employ, many of whom may pose employment risks. The court's ruling regarding these plaintiffs would, if upheld, constitute due warning to this larger group that if they were to seek rehabilitative treatment they would be subject to automatic discharge.

^{66/} It is far easier for TA employees to hide the fact of heroin use and addiction (App.613a) than methadone treatment, because, *inter alia*, the latter is a fact known to large numbers of persons and reflected in numerous public records; it may involve brief hospitalization initially which would be reported to the TA; and it requires the regular use of methadone which can be detected in TA medical tests. App. 617a; 2379-80a.

The irrationality of the court's ruling is demonstrated by the policies of major employers with significant experience in employing rehabilitated former addicts. Testimony at trial revealed that such employers do not discharge employees discovered to be heroin addicts but instead provide them an opportunity to seek treatment. See, e.g., App. 758-60a (Chemical Bank), 1148a (Con Edison), 1172a (Kennecott Copper). These policies are based not merely on concern with advancing sensible social policy but on business interests in encouraging the hidden addict population in the work force to come forward and seek treatment. App. 1193-95a.^{67/}

^{67/} Similar business-oriented concerns underlie comparable policies regarding alcoholics. App. 1191-95a; 760-61a.

CONCLUSION

For the reasons set forth above the judgment below should be affirmed except insofar as it dismissed the action with respect to plaintiffs Beazer, Reyes and Wright. This Court should provide that they be ordered reinstated, with back pay, seniority and other TA employment rights from the date of their unlawful discharges.

DATED: New York, New York
April 4, 1977

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- - - - -X
CARL A. BEAZER, et al., :
Plaintiffs-Appellees, :
-against- : AFFIDAVIT OF
NEW YORK CITY TRANSIT AUTHORITY, et al., : SERVICE
Defendants-Appellants. :
No. 76-7295
- - - - -X

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

BETTINA LANDE, being duly sworn, deposes and says:

1. That she is a para-legal in the office of Elizabeth B. DuBois, one of the attorneys for plaintiffs in the above-captioned action.

2. That on the 4th day of April, 1977, she served copies of the Brief of Plaintiffs-Appellees on Defendants-Appellants by delivering same personally to:

New York City Transit Authority
370 Jay Street
Brooklyn, New York

Bettina Lande
Bettina Lande

Sworn to before me this
4th day of April, 1977

Pauline Reinish

Notary Public

PAULINE REINISH
Notary Public, State of New York
No. 4631656
Qualified in Bronx County
Commission Expires March 30, 1978